IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

MR. JUSTICE SH. AZMAT SAEED
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE MAQBOOL BAQAR
MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL

CONSTITUTION PETITION NO.39 OF 2016
(Under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973, for setting aside the order of the Chief Justice of the Lahore High Court, dated 26.11.2016, passed on the administrative side)

Mr. Justice Muhammad Farrukh Irfan Khan, Judge, Lahore High Court, Lahore ... Petitioner (s)

Versus

The Federation of Pakistan through Secretary, Ministry of Law, Justice & Parliamentary Affairs Division, Government of Pakistan, Civil Secretariat, Islamabad and 4 others ... Respondent (s)

For the Petitioner (s) : Mr. Hamid Khan, Sr. ASC
Mr. Muhammad Waqar Rana, ASC
Mr. Hassan Irfan Khan, ASC
assisted by Barrister Khadija Yasmin Bokhari, Advocate
Mr. M.S. Khattak, AOR

For the Federation : Ch. Aamir Rehman, Additional AGP
Danish Aftab, Associate Lawyer

Respondents No.3 and 5 : N.R.

For Respondent No.4 : Mr. Mansoor Usman Awan, ASC
Ch. Akhtar Ali, AOR

On behalf of Govt. of the Punjab	:	Mr. Ahmed Awais, Advocate General, Punjab Mr. Shah Gul, Additional A.G., Punjab Mr. Zahoor Ahmed, Assistant Registrar, Lahore High Court
Date of Hearing	:	18.10.2018

JUDGMENT

SH. AZMAT SAEED, J.- The instant Constitution Petition, under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution of 1973), has been filed by a sitting Judge of the learned Lahore High Court, calling into question the Order dated 26.11.2016, passed by the then Chief Justice of the Lahore High Court, re-fixing *inter se* seniority of the Petitioner and some of the other Judges of the learned Lahore High Court, including Respondents No.3 to 5.

2. The brief facts necessary for adjudication of the *lis* at hand are that vide Notification dated 17.02.2010, 22 Additional Judges were appointed by the President, Islamic Republic of Pakistan, to the learned Lahore High Court, Lahore, including the Petitioner and Respondents No.3 to 5. On 19.02.2010, the then Chief Justice of the Lahore High Court administered the Oath to 21 out of the 22 of the aforesaid Additional Judges of the Lahore High Court. The Petitioner at that point of time was not in

Pakistan and, in fact, was in United States of America. It is his case that he was contacted by the then Chief Justice of the Lahore High Court through his brother on 18.02.2010, informing the date of the Oath. The Petitioner could not reach Pakistan for the Oath scheduled for 19.02.2010 and as per his case the then Chief Justice of the Lahore High Court was informed accordingly. The Petitioner arrived in Pakistan on the night between 19th and 20th of February, 2010, and admittedly, he was administered the Oath of his Office on 20.02.2010.

3. Thereafter, a Seniority List of the Judges of the Lahore High Court, Lahore, was issued showing their *inter se* seniority. In the said List, the Petitioner was shown senior, *inter alia,* to Respondents No.3 to 5. It is the case of the Petitioner that for the next several years periodically such Lists were issued both by way of routine weekly rosters and as and when new Additional Judges were inducted and the Petitioner was shown as senior to Respondents No.3 to 5 who never took any exception thereto. However, in March, 2015, Respondents No.3 to 5, made a representation to the then Chief Justice of the Lahore High Court, claiming that they were senior to the

Petitioner as their *inter se* seniority should be reckoned from the date when the Petitioner and the said Respondents No.3 to 5 made their respective Oaths. It was their case that since, Respondents No.3 to 5 had entered the Office upon taking Oath on 19th February, 2010, their seniority should be reckoned from such date and that of the Petitioner from 20th February, 2010 when the Petitioner took his Oath of Office. Vide Order dated 26.03.2015, the then Chief Justice of the Lahore High Court choose not to disturb the *inter se* seniority whilst simultaneously advising the parties to air their grievance, if they so desired, before an appropriate judicial forum.

4. That on 25.10.2016, Respondents No.3 to 5 once again made an application to the then Chief Justice of the Lahore High Court, regarding re-fixation of the seniority vis-à-vis the Petitioner by re-agitating their claim on the basis of the dates on which the Petitioner and the said Respondents had made their Oath of Office. In the meanwhile, the then Chief Justice, who had dealt with the earlier representation of Respondents No.3 to 5 and passed the above-mentioned Order dated 26.03.2015 referred to above, had since retired and the new incumbent had stepped into his shoes.

5. That the then Chief Justice of the Lahore High Court vide Order dated 26.11.2016, accepted the representation of Respondents No.3 to 5 and re-fixed their *inter se* seniority by holding that Respondents No.3 to 5 were senior to the Petitioner. The primary basis of such an order was that the Petitioner had entered his Office by making his Oath on 20.02.2010, while Respondents No.3 to 5 had made their Oath of Office on 19.02.2010. It is the said Order dated 26.11.2016, which has been challenged through the instant Constitution Petition.

6. It is contended by the learned counsel for the Petitioner that before passing the impugned Order neither a formal or proper hearing was conducted nor was the Petitioner afforded a full opportunity to present his case. Thus, for all intents and purposes, the Petitioner has been condemned unheard, hence, the impugned Order, is liable to be set aside.

7. It is further contended that upon making of Oath by the 21 Additional Judges, including Respondents No.3 to 5 on 19.02.2010, it was agreed and understood by all that the seniority of the Petitioner, who, for reasons beyond his control, was not

available to make the Oath on the above-said date, would not be effected and it was with their consent that the seniority of the Petitioner was fixed. In support of the aforesaid contentions, the learned counsel has drawn our attention to the Affidavits filed by two retired Judges of the learned Lahore High Court, who were part of the 22 Judges, notified vide Notification dated 17.02.2010, and had made Oath on 19.02.2010, hence, the said Respondents having waived off their right, if any, to seniority *qua* the Petitioner can no longer agitate the matter. It is added that this aspect of the matter has been totally ignored by the then Chief Justice of the Lahore High Court while passing the impugned Order dated 26.11.2016.

8. It is further contended that since the initial appointment as Additional Judges in numerous weekly rosters were issued evidencing the *inter se* seniority of the Judges of the Lahore High Court, whereby the Petitioner was shown as senior to Respondents No.3 to 5 who for years did not raise any issue, hence, had acquiesced to the seniority of the Petitioner and were estopped from agitating the matter before the then

Chief Justice of the Lahore High Court, hence, the impugned Order, is liable to be set aside.

9. Without prejudice, it is added that Respondents No.3 to 5 raised an issue regarding their alleged claim of seniority by way of the representation dated 26.03.2015 before the then Chief Justice of the Lahore High Court who declined to disturb the *inter se* seniority of the Petitioner vis-à-vis Respondents No.3 to 5, leaving the said Respondents to seek their remedy in accordance with the law i.e. through an appropriate judicial forum. In the circumstances, the subsequent Chief Justice could not review the earlier Order of his predecessor that to without any legal or factual basis. Furthermore, even otherwise no right or review stood vested with the Chief Justice, hence, the impugned Order is illegal and is liable to be set aside.

10. Without prejudice to the above, it was further contended that the Petitioner on attaining the requisite seniority became a Member of the Administrative Committee of the Lahore High Court and during the proceedings whereof the Petitioner did not see eye to eye with the mode and manner of the decisions taken by the then Chief Justice of the Lahore High Court and

it is only to remove him from the Administrative Committee that the representation on behalf of Respondents No.3 to 5 was engineered and the impugned Order passed, which on the face of it, suffers from malice and bias, hence, is without jurisdiction and is liable to be set aside.

11. The learned counsel further contended that it has now been conclusively settled by this Court in the case reported as Muhammad Aslam Awan, Advocate Supreme Court v. Federation of Pakistan and others (2014 SCMR 1289) that *inter se* seniority of the Judges of the learned Lahore High Court would be reckoned from the date of their appointment as Additional Judges. Thus, both the Petitioner and Respondents No.3 to 5 having been appointed on the same day through the Notification dated 17.02.2010, and the seniority of the Petitioner and Respondents No.3 to 5 could not be determined on the basis of the date when they made their Oaths of Office. In this behalf, the learned counsel further contended that the provision for appointment of Additional Judges to the High Court is Article 193 of the Constitution of 1973, and the provisions for making of Oath is Article 194 of the

Constitution of 1973. Each of said Articles is separate and distinct; the latter cannot be read so as to override the former, which aspect of the matter has also been ignored while passing the impugned Order.

12. The learned counsel next contended that not only in the Constitutional dispensation of Pakistan and the jurisprudence emanating therefrom the appointment to an office is distinct from making Oath thereof but the same is also true from the other jurisdictions. It is his case that at best where making an Oath is prescribed by the Constitution of a country, the failure or absence of such Oath could only have the effect as is mentioned in the Legislative Instruments e.g. Constitution, requiring such Oath. In pith and substance, it was the case of the learned counsel for the Petitioner that after appointment in the absence of an Oath the Additional Judge may not have entered upon his Office but does not imply that he was not a Judge for all other intents and purposes. In support of his contentions, the learned counsel for the Petitioner referred to the judgment of the Supreme Court of India, in the case titled Ram Pal Singh v. State of U.P. and Ors passed in Petition for Special Leave to Appeal

(Civil) No.31990 of 2017. Whereby as per the learned counsel, this aspect of the matter has been identified, highlighted and implemented. In the circumstances, there was no occasion for determining the seniority of the Petitioner from the date of Oath rather than the date of appointment, hence, the impugned Order, is liable to be set aside.

13. The learned counsel, in the above context, drew the attention of this Court to Article 194 of the Constitution of 1973, which reads as follows:

> "**194.** Before entering upon office, the Chief Justice of a High Court shall make before the Governor, and any other Judge of the Court shall make before the Chief Justice, oath in the form set out in the Third Schedule"

In the above context, the learned counsel further contended that it is a "Judge" who makes an Oath and the said individual upon his appointment under Article 193 of the Constitution of 1973, is a Judge for all intents and purposes other than for exercising the powers conferred upon a Judge. The learned counsel further contended that similar terminology was employed by Article 93 of the Constitution of Pakistan,

1962. The aforesaid, it is contended, is a departure from the previous Constitutional dispensation as provided under Section 220(4) of the Government of India Act, 1935, wherein it is stated as follows:

> "**220** (4) Every person appointed to be a judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act."
>
> (emphasis supplied)

Similarly, under Article 215 of the Constitution of Pakistan, 1956, again it is scribed as follows:

> "**215.** A person elected or appointed to any office mentioned in the Second Schedule shall before entering upon the office make and subscribe an oath or affirmation in accordance with that Schedule."
>
> (emphasis supplied)

By relying upon the aforesaid provisions, it was contended that previously an individual remained a "person" and did not become a Judge until he took his Oath. However, since in the Constitution of Pakistan, 1962, followed by the interim Constitution of Pakistan, 1972 and the Constitution of the Islamic Republic of

Pakistan, 1973, a distinction has been drawn that a person who becomes a Judge on appointment and as Judge makes his oath to assume his office.

14. In the above backdrop, it is contended that it was now clear and obvious that the relevant provisions of the Constitution of 1973, there is no manner of doubt that a Judge is appointed by the President in terms of Article 193 of the Constitution of 1973, and therefore, he becomes a Judge or an Additional Judge, as the case may be, he is entitled to all privileges of a Judge, including his seniority.

15. In short, it was contended by the learned counsel that the existing Constitution deliberately made a departure from the prior procedure of appointment and entering into Office and the two were separated and as is obvious that upon appointment by the President in terms of Article 193 of the Constitution of 1973, an individual becomes a Judge and as a Judge, he makes an Oath in terms of Article 194 of the Constitution of 1973, hence, the Petitioner was a Judge with effect from the date of his appointment i.e. 17.02.2010, as were Respondents No.3 to 5 and in view of his age he was always senior to Respondents No.3 to

5, hence, the impugned Order is contrary to the Constitution of 1973 and is liable to be set aside.

16. Mr. Shan Gul, learned Additional Advocate, Punjab, appearing on behalf of Respondent No.2, controverted the contentions of the learned counsel for the Petitioner by contending that an accumulative reading of Articles 193 and 194 of the Constitution of 1973, lead to an irresistible conclusion that an appointment of a person as a Judge of the learned High Court is completed only upon his making an Oath before the Chief Justice of the said High Court. Till such an Oath is made the person is not, in law, a Judge and as he or she has not yet entered his or her Office, is not entitled to any benefit or advantage, including renunciation or seniority on any date prior to having made his or her Oath in terms of Article 194 of the Constitution of 1973.

17. The learned Additional Advocate General, Punjab, further contended that there is no order of the then Chief Justice of the learned Lahore High Court contemporaneous with the appointment of the Petitioner and Respondents No.3 to 5, consciously fixing their *inter se* seniority either by operation of law or by consent, as claimed by the Petitioner. It is his case that neither such

an order has been placed on the file nor is any such order available on the record of the learned Lahore High Court, as is also mentioned in the impugned Order.

18. It is further contended that the power to appoint a Judge is vested with the President subsequent to due compliance of the procedure as laid down in the Constitution of 1973, including Articles 175 and 175A thereof. It is his case that the period as to when such an appointment has to take effect is not specified leaving the option open to the President i.e. the appointing authority to fix any future date. In the instant case as is also the common practice, the date when such an appointment will take effect set forth in the Notification of appointment i.e. when the person so appointed makes an Oath. Thus, the appointment takes effect from the date of the Oath and not the date of the Notification, as is obvious from the contents of the Notification itself. Such a process and procedure is in consonance with Article 194 of the Constitution of 1973. Therefore, in law, the Petitioner became a Judge with effect from 20.02.2010 when he took Oath of his Office and his seniority is to be reckoned from such date, as has been correctly construed by way of the impugned Order.

19. The learned Additional Advocate General, Punjab, next contended that the Petitioner has misconstrued the judgment of this Court in the case reported as Muhammad Aslam Awan, Advocate Supreme Court (*supra*). It is his case that nowhere in the said judgment it has been held that an appointment of a Judge is completed from the date of the order of appointment or the Notification thereof. The term "appointment" used therein when read in its proper context refers to the date when such an appointment is completed by making an Oath in accordance with Article 194 of the Constitution of 1973. It is added that the matter has been laid to rest in the concurring additional note by Asif Saeed Khan Khosa, J., wherein in no uncertain terms it was unequivocally stated that the seniority of an Additional Judge is to be reckoned from the date when he makes an Oath in accordance with the Constitution of 1973.

20. The learned Additional Advocate General, Punjab, further contended that his contentions also find support from the judgments reported as Supreme Court Bar Association through President and others v. Federation of Pakistan and others (PLD 2002 SC 939)

and Sabir Ali Sajid v. Muhammad Maqsood (PLD 2006 Lahore 607). He also relied upon the judgment of the Supreme Court of Minnesota in Winters v. Kiffmeyer (No.C8-02-1180) decided on August 30, 2002) as well as an article titled The Appointment and Removal of William J. Marbury and When an Office Vests (89 Notre Dame L. Rev. 199).

21. The learned counsel appearing on behalf of private Respondents No.3 to 5, supported the contentions of the learned Additional Advocate General, Punjab, and reiterated that the seniority of the Petitioner and Respondents No.3 to 5 was not consciously fixed by the Chief Justice of the Lahore High Court upon their appointments. It was also categorically denied that the said Respondents No.3 to 5 had consented to the fixation of the seniority of the Petitioner as claimed.

22. The learned counsel further contended that the question of acquiescence and waiver does not arise. He further added that acquiescence and waiver are sub-species of estoppel and it is settled law that there can be no estoppel against the law much less the Constitution.

23. The learned counsel further contended that the then Chief Justice, Khawaja Imtiaz Ahmed, did not

decide the representation of Respondents No.3 to 5, and left the matter open, hence, in the absence of the earlier decision, the question of review does not arise. It is further added that the issue of *inter se* seniority of the Additional Judges of the Lahore High Court as well as with reference to the permanent Judges was perhaps not clear and the matter firstly crystallized upon the pronouncement of the judgment of this Court in the case reported as Muhammad Aslam Awan, Advocate Supreme Court (*supra*), more particularly, the concurring additional note by Asif Saeed Khan Khosa, J. whereby it was categorically held that the seniority of the Additional Judges of the High Court would be determined from the day they make an Oath under Article 194 of the Constitution of 1973. Subsequently, after much hesitation, Respondents No.3 to 5, made an application for re-fixation of their seniority in terms of the said judgment. In the circumstances, it is contended, that the said Respondents cannot be said to have waived their right to seniority or acquiesced to the display of the name of the Petitioner in the roster, as purportedly senior to them.

24. The learned counsel further contended that the reference by the learned counsel for the Petitioner to the historical background in the context of the Legislative and Constitutional Instruments for appointment of the Judges so as to highlight that in the Government of India Act, 1935, and the late Constitution of Pakistan, 1956, the word “person” was used in the context of making an Oath by a Judge, while in the subsequent Constitutional Instruments, including the Constitution of Pakistan, 1962, interim Constitution of Pakistan, 1972 and the present Constitution of 1973, the word “Judge” is used in the context of making an Oath (Article 194) is misconceived, as in the earlier two Legislative and Constitutional Instruments, i.e. the Government of India Act, 1935, and the late Constitution of Pakistan, 1956, the term “Judge” has not been defined therein, while in the subsequent Constitutional Instruments i.e. Constitution of Pakistan, 1962, interim Constitution of Pakistan, 1972 and the present Constitution of 1973, the term “Judge” has been defined to include a person acting as a Judge. Thus, the very premise of the contentions of the learned counsel for the Petitioner is misconceived and amounts to reading something into the Constitution,

which is not there. The learned counsel rounded up his contentions by contending that the order of the President and the Notifications of appointment of the Judges and the Chief Justices perceived their making Oath of Office even by several weeks. If the argument of the learned counsel for the Petitioner is accepted and said Judges are deemed to have been appointed on the dates of their Notification, the total number of Judges would increase beyond the prescribed limit and there would also be a possibility of two Chief Justices holding the Office at the same point of time i.e. one who is appointed and notified in anticipation of a vacancy and the other Chief Justice already occupying his Office having not yet retired or having not been elevated yet to the Supreme Court. Thus, the entire premise of the contentions raised on behalf of the Petitioner are an over simplistic interpretation, which may result in absurdity which can never be the intention of the framers of the Constitution.

25. Having heard the learned counsel for the parties and the learned Law Officers, it has come to the forefront that the heart of the controversy requiring adjudication is as to when, under our Constitutional dispensation, a person, in fact and in law, stands

appointed as an Additional Judge or a Judge for the purposes of determining his *inter se* seniority with respect to his colleagues. The instant matter must necessarily be settled not only generally but, more particularly, in the context of the facts and circumstances of the case at hand.

The Chief Justice and the Judges of the Supreme Court and the High Courts are appointed by the President of Pakistan. Reference, in this behalf, may be made to Articles 175A to 182 of the Constitution of 1973 with regard to the Supreme Court of Pakistan; and Articles 192 to 197 of the Constitution of 1973 with regard to the appointment of Chief Justices and Judges of the High Courts. The Additional Judges are appointed by the President of Pakistan to the High Courts in terms of Article 197 of the Constitution of 1973. Such an order of appointment is notified through a Notification issued by the Secretary, Ministry of Law, Justice and Parliamentary Affairs Division, Government of Pakistan. In the instant case, the Appellant and the private Respondents were admittedly appointed as Additional Judges of the Lahore High Court by the President of Pakistan and in this behalf, the Notification dated

17.02.2010, was issued by the aforesaid Secretary. The operative part of the aforesaid Notification is reproduced hereunder for ease of reference:

> "GOVERNMENT OF PAKISTAN
> LAW, JUSTICE AND PARLIAMENTARY AFFAIRS DIVISION
> .....
>
> Islamabad, the 17th February, 2010
>
> NOTIFICATION
>
> No.F.5(1)/2010-A.II.- In exercise of the powers conferred by Article 197 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to appoint the following persons as Additional Judges of the Lahore High Court for a period of one year with effect from the date they make oath of their office:- ..."
>
> (emphasis supplied)

It is nobody's case that the aforesaid Notification does not accurately and faithfully reflect the Order of the President of Pakistan, appointing the Additional Judges as mentioned in the aforesaid Notification.

26. A perusal of the said Notification reveals that the same does not have the tone and tenor of an appointment *in presenti*. It does not state that the appointment is "with immediate effect" or that the President "hereby appoints" such persons as the Additional Judges of the Lahore High Court. On examination it becomes clear and obvious that the said appointments are to take effect when the said Additional

Judges make their Oaths. Thus, it is the intention of the appointing authority that the appointment of the Petitioner as well as the private Respondents would take effect from the date when they make their Oaths before the Chief Justice of the Lahore High Court. Thus, for all intents and purposes, the Petitioner as well as the private Respondents became the Additional Judges on the said date when they, in fact, made their Oaths. Such an interpretation is not only logical but also in accordance with the plain meaning of the words employed in the said Notification dated 17.02.2010 reproduced above. A contrary conclusion is not possible without doing extreme violence to the words of the Notification and the provisions whereunder it was issued.

27. A Notification in advance for appointment of Judges of the Superior Courts was not made for the first time vide Notification dated 17.02.2010. An overview of such Notifications, in advance, have been recorded to in paragraph 30 of the judgment of this Court reported as Supreme Court Bar Association through President and others (*supra*). The said Notifications were held to be valid. Numerous other similar Notifications are also available. In fact, it has been found very difficult to locate

a Notification to the contrary i.e. of appointment of a Judge of a Superior Court *in presenti*. No such Notification was produced by either side in Court.

28. Be that as it may, many of the questions which have floated to the surface in the instant *lis* stand answered directly or by necessary implication in paragraph 31 of the aforesaid judgment i.e. Supreme Court Bar Association through President and others (*supra*), which is reproduced hereunder for ease of reference:

> "31. Last but not the least the appointments in question had the blessings of the succeeding Chief Justice and judicial consultee Mr. Justice Muhammad Bashir Jehangiri who was consulted by the then Chief Justice of Pakistan at the initial stage and before whom all the four Judges made oath at the final stage i.e. on 10th January, 2002. The impugned notification was issued on 26th December, 2001 with an explicit recital that the appointments will take effect from 10th January, 2002, namely. the day when four vacancies were available Mr. Justice Muhammad Bashir Jehangiri had taken oath as Chief Justice of Pakistan on 7th January, 2002 but he did not make any move for withdrawal of

> the impugned notification. Had he not endorsed the recommendations and the appointments he would have certainly asked for a back reference or sent his own recommendations or refused to administer the oath of office to the appointees. Another noteworthy circumstance which points to ratification by Mr. Justice Muhammad Bashir Jehangiri of the appointments made in advance is that on 31st January, 2002 he had presided over the Bench which had heard one of the above-mentioned Constitution petitions but had not suspended the impugned notification."

(emphasis supplied)

29. It is not only the obvious intention as is apparent from the Notification itself that the appointment as Additional Judges was to take effect from the date when the Oath is made but the interpretation of the provisions of the Constitution of 1973 when examined in the light of the afore-quoted judgment of this Court reported as Supreme Court Bar Association through President and others (*supra*) lead to a similar conclusion. A plain reading of Article 194 of the Constitution of 1973 referred to above would suggests that a person can only enter the Office of a Judge when he makes Oath in the manner set out in the Constitution of 1973. In the

absence of such an Oath, the person has not entered the Office of a Judge and his appointment thereto does not stand completed and concluded. In the afore-quoted judgment i.e. Supreme Court Bar Association through President and others (*supra*) making of an Oath has been referred to as the "**final stage**" of an appointment. The aforesaid comes into a sharper focus when examined in the context of the contentions raised by the learned counsel reproduced at page 970 of the judgment in the case reported as Supreme Court Bar Association through President and others (*supra*), where it was canvassed that the appointment of a Judge consists of five stages commencing with the recommendation with final stage the making by the Oath of Office.

30. There is also another aspect of the matter, which is highlighted by the choice of words used in Article 194 of the Constitution of 1973 that a person enters the Office of a Judge or an Additional Judge upon making the prescribed Oath. The said provision would imply that till such Oath is made the person has not entered the Office of a Judge, which Office, thus, remains vacant.

31. The aforesaid becomes even more obvious when Article 194 of the Constitution of 1973 is examined in the context of the observations made in paragraph 31 of the judgment in the case reported as Supreme Court Bar Association through President and others (*supra*) reproduced herein above. It is apparent from the observations highlighted that there was a legal possibility of withdrawal of a Notification for appointing a Judge prior to his taking the Oath. Article 209 of the Constitution of 1973 protects the tenure of Office of a Judge, including an Additional Judge who could only be removed through the Supreme Judicial Council or by lapse of time. If after issuance of a Notification the person mentioned therein was in law a Judge, there could be no possibility of withdrawal of the said Notification in view of Article 209 of the Constitution of 1973, which leaves no manner of doubt that a person is not, in fact, or in law a Judge until and unless he makes his Oath in terms of Article 194 of the Constitution of 1973 i.e. the "**final stage**" of his appointment.

In view of the above, the attempt of the learned counsel for the Petitioner to assert that by employing the word "Judge" in Article 194 of the Constitution of 1973 a

person becomes a Judge prior to making an Oath looses its steam and stands bereft of any force.

32. The aforesaid judgment i.e. Supreme Court Bar Association through President and others (*supra*) was passed prior to the 18th Constitutional Amendment and incorporation of Article 175A in the Constitution of 1973 but such subsequent amendments do not detract from the essential interpretation that the appointment of Judges to a Superior Court is only completed and takes effect when such Judge makes his Oath in the manner prescribed in the Constitution of 1973.

33. At this juncture, it would be appropriate to advert the contentions of the learned counsel for the Petitioner that failure to take Oath may deprive a person of certain rights but not the Office itself. Incidentally, the judgment, in this behalf, to the Indian Supreme Court pertains to an elected Office i.e. of a *punchiat*. In our Constitution, similar jurisprudential concept is catered for in Article 65 of the Constitution of 1973, which is reproduced hereunder:

> "**65.** A person elected to a House shall not sit or vote until he has made before the House oath in the form set out in the Third Schedule."
>
> (emphasis supplied)

The intention of the framers of the Constitution of 1973 is rather obvious, a person elected to the House of the Parliament, in the absence of an Oath cannot sit or vote but it does not suggest that such an Oath is a *sine qua non* for being considered as an elected Member.

34. The choice of words employed and the context in which they occur are different and distinct from those of Article 194 of the Constitution of 1973 and cannot be transposed into the chapter pertaining to the judicator.

35. Various other Offices catered for in our Constitution of 1973 are for a fixed tenor and also require the making of an Oath. Thus, in addition to the Office of an Additional Judge of the High Court, other Offices are also held for a fixed period under the Constitution of 1973. In each and everyone of such situation, the period commences from the date when the Oath is made. Reference, in this behalf, may be made to the tenure of Office of the Auditor General of Pakistan (Article 168(2) and (3) and the Office of the Chief Election Commissioner and the Members of the Election Commission (See Article 215 of the Constitution).

Thus, it is also the scheme of the Constitution of 1973 that where an Office for a fixed period envisages a

pre-condition of making an Oath, such period would commence under our Constitutional dispensation from the date when the Oath is made.

36. An overview of the aforesaid leaves no manner of doubt that in terms of appointment by the President of Pakistan as admittedly reflected faithfully in the Notification dated 17.02.2010, the persons mentioned therein stood appointed as the Additional Judges of the Lahore High Court with effect from the date when they make their Oaths in accordance with the Oath prescribed. Such an interpretation not only flows from a plain reading of the Notification but also is in consonance with the provisions of the Constitution of 1973 and the judgment of this Court designating the making of Oath as the final stage of appointment. Furthermore, until such an Oath is made, the person does not enter into the Office of an Additional Judge, which remains vacant. Furthermore, an interpretation that the appointment of an Additional Judge commences from the date when he makes an Oath is also in accordance with the scheme of the Constitution of 1973, as is apparent from the various Articles of the Constitution of 1973 pertaining thereto, referred to above.

37. In the case reported as Muhammad Aslam Awan and others (*supra*), it has been conclusively held by this Court that the commencement date for determination of the seniority of the Judges of the High Courts is the date on which he was appointed as Additional Judges of such High Court. In the concurring additional note my learned brother, Asif Saeed Khan Khosa, J., has also observed that *inter se* seniority of the Judges would be determined from the date on which they make Oath as the Additional Judges of the High Court.

It is an admitted fact that the Petitioner made his Oath on the 20th of February, 2010, while the private contesting Respondents made their Oaths on 19th of February, 2010, hence, by Applying the aforesaid principles to the case at hand, the said Respondents are senior to the Petitioner having been appointed earlier as has been correctly held by way of the impugned judgment.

38. The learned counsel for the Petitioner also objected to the impugned judgment on the ground that the Chief Justice of the Lahore High Court had become *functus officio* and the private Respondents, even

otherwise, lost their rights to agitate the matter on the ground of waiver and acquiescence.

39. The forum of final adjudication of disputes pertaining to *inter se* seniority the Judges of the Superior Courts has not been set forth in the Constitution of 1973 or any law promulgated thereunder. Such a forum was identified with clarity by this Court in the judgment reported as Reference by the President of Pakistan under Article 186 of the Constitution of Islamic Republic of Pakistan, 1973 (PLD 2013 SC 279) wherein it was held that such *inter se* seniority would first be decided by the Chief Justice concerned and thereafter by a competent judicial forum. In this context, the contentions raised on behalf of the learned counsel for the Respondents that upon such final crystallization they re-agitated the matter of their seniority before the Chief Justice of the Lahore High Court is not without force.

40. No doubt, the matter was earlier raised before the Chief Justice of the Lahore High Court. However, the then Chief Justice Khawaja Imtiaz Ahmed, (as he then was) declined to decide the matter. Thus, it cannot be said that the impugned judgment is a review of the said Order. Even otherwise, final adjudication of such

disputes is through a judicial adjudication as is being finally decided by this Court through the instant proceedings.

It is also a matter of record that the time of making of the Oath in February, 2010, no order was passed by the then Chief Justice fixing the *inter se* seniority with the consent of the parties. No such document has been placed before us or otherwise identified so as to bar or preclude the private Respondents from asserting their claim of seniority. Furthermore, it is settled law that acquiescence is a specie of estoppel. It is equally settled law that there can be no estoppel against law much less or the Constitution as is apparent from the judgments of this Court reported as Mr. Fazlul Quader Chowdhry and others v. Mr. Muhammad Abdul Haque (PLD 1963 SC 486), Pir Sabir Shah v. Shad Muhammad Khan, Member Provincial Assembly, N.W.F.P. and another (PLD 1995 SC 66), Malik Asad Ali and others v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs, Islamabad and others (PLD 1998 SC 161), Muhammad Mubeen-us-Salam and others v. Federation of Pakistan through Secretary, Ministry of Defence and others (PLD 2006 SC 602) and Zarai Taraqiati Bank

Limited and others v. Said Rehman and others (2013 SCMR 642).

41. The Petitioner is relying upon the Rosters and the Seniority Lists periodically issued in violation of the law as laid down by this Court. He is thus attempting to claim permanent rights on the basis of an illegality or illegal orders which too is not permissible in view of the law laid down by this Court in the judgments reported as The Engineer-in-Chief Branch through Ministry of Defence, Rawalpindi and another v. Jalaluddin (PLD 1992 SC 207), Abdul Haque Indhar and others v. Province of Sindh through Secretary Forest, Fisheries and Livestock Department, Karachi and 3 others (2000 SCMR 907), Bashir Ahmed and others v. Deputy District Education Officer (M) and others (2005 SCMR 1040), Nazir Ahmad Panhwar v. Government of Sindh through Chief Secretary, Sindh and others (2005 SCMR 1814), and Muhammad Nadeem Arif and others v. Inspector-General of Police, Punjab, Lahore and others (2011 SCMR 408).

In view of the foregoing, there was no legal bar prohibiting the Respondents from agitating the matter before the Chief Justice of the High Court, which

culminated in the judgment in their favour which is impugned before us.

At this juncture, reference to Article 255 sub-article (2) of the Constitution of 1973 may be appropriate. The said provision caters for a situation where it is impracticable to make an Oath before a person specified, in this behalf, in the Constitution of 1973. In an eventuality the Oath can be made before another person duly authorized under the said sub-article. This course of action was not adopted in the instant case. However, we may add, in the past, Article 255(2) of the Constitution of 1973 has been pressed into service for making of Oaths by the Superior Court Judges. However, such occasions were not our finest hours.

42. Before parting, we may also add that every effort has to be made to ensure that all the persons appointed make their Oath together subject to unforeseen circumstances. However, no discussion, in this behalf, is vested with the Chief Justice to take Oaths in batches so as to artificial grant seniority to some Judge over other Judges. Such a course of action would be devoid of *bona fide* and hence, of jurisdiction and therefore justiceable.

43. The aforesaid are the reasons of our short Order of even date, which is reproduced herein below:

> "For the reasons to be recorded later, this petition is dismissed."

Judge

Judge

Judge

Judge

Islamabad, the
18th October, 2018 Judge
'APPROVED FOR REPORTING'
*Mahtab & Safdar/**