IN THE SUPREME COURT OF PAKISTAN
(ORIGINAL JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE ASIF SAEED KHAN KHOSA
MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE GULZAR AHMED
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE FAISAL ARAB
MR. JUSTICE IJAZ UL AHSAN

CONSTITUTION PETITIONS NO.1, 2 AND 10 OF 2016
(Petitions under Article 184(3) of the Constitution, 1973)

1.	Syed Shabbar Razi Rizvi and another **Vs.** Federation of Pakistan, Ministry of Law and Justice Division, through its Secretary, Islamabad and another	In Const.P.1/2016
2.	Syed Shabbar Razi Rizvi and another **Vs.** Federation of Pakistan, Ministry of Law and Justice Division, through its Secretary, Islamabad and others	In Const.P.2/2016
3.	Syed Sajjad Hussain Shah **Vs.** Federation of Pakistan, Ministry of Law and Justice Division, through its Secretary and others	In Const.P.10/2016

For the petitioner(s): Mr. Ali Sibtain Fazli, ASC
Petitioners in person
Ch. Akhtar Ali, AOR
(In Const.Ps.1 & 2/2016)

Sh. Zamir Hussain, ASC
Syed Rifaqat Hussain Shah, AOR
(In Const.P.10/2016)

For the respondent(s): Not represented
(In all cases)

Date of hearing: 5.1.2018

JUDGMENT

MIAN SAQIB NISAR, CJ.- These petitions under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 *(the Constitution)* have been filed by the former Judges of the Lahore High Court with the prayer, *inter alia*, that the judgment reported as **Sindh**

High Court Bar Association through its Secretary and another Vs. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 SC 879), may be declared *per incuriam* and of no legal effect to the extent of removal of petitioners/Judges and the subsequent judgment reported as **Justice Hasnat Ahmed Khan Vs. Federation of Pakistan (PLD 2011 SC 680)** may also be revisited, reviewed and set aside, and the judgments reported as **Proceedings Against: Justices (R) Iftikhar Hussain Chaudhry, etc. (PLD 2011 SC 197)** and **Justice Abdul Hameed Dogar, Former Judge/CJP and others Vs. Federation of Pakistan/State (PLD 2011 SC 315)** may be declared *per incuriam* and of no legal effect.

2. The brief background of the case is that on 3rd November, 2007 the then President of Pakistan, in his capacity as the Chief of Army Staff whilst declaring an emergency put the Constitution in abeyance and issued the Provisional Constitution Order No.1 of 2007 *(PCO, 2007)* followed by the Oath of Office *(Judges)* Order, 2007 *(Oath Order, 2007)*, making most of the Judges of the superior judiciary dysfunctional. On that fateful day i.e. 3rd November, 2007, a 7-Member Bench of this Court, in the case of **Wajihuddin Ahmed v. Chief Election Commissioner (PLD 2008 SC 25)** passed an order, *inter alia*, restraining the Judges of the superior Courts from taking oath under the PCO, 2007 or any other unconstitutional instrument. The petitioners *(former Judges of the Lahore High Court)*, having taken oath under the Oath Order, 2007, continued to perform duties/act as Judges of the Lahore High Court. But on account of the decision of this Court rendered by a 14-Member Bench on 31st July, 2009 reported as **Sindh High Court Bar Association's**

case *(supra)*, the petitioners, along with other Judges of the superior Courts who had taken oath under the Oath Order, 2007, were declared to have violated the above said restraint order and notices for contempt of Court under Article 204 of the Constitution read with relevant provisions of the Contempt of Court laws were issued to them, therefore, they *(the Judges)* ultimately had to resign from their offices as the Judges of the High Court. Being aggrieved of the judgment in **Sindh High Court Bar Association's case** *(supra)*, the petitioners as well as other Judges moved review petitions before this Court against the said judgment. Office objections were raised in respect of the said review petitions and the same were returned. The petitioners, as also the other Judges, filed Civil Misc. Applications *(C.M.A. No.2750/2009 in C.R.P. No.Nil of 2009 in Const.P.No.8 of 2009 by Mr. Justice Syed Shabbar Raza Rizvi, CMA No.2747/2009 in C.R.P. No.Nil of 2009 in Const.P.No.8 of 2009 by Mr. Justice Hasnat Ahmed Khan and C.M.As. No.2776 & 2782 of 2009 in C.R.P. No.Nil of 2009 in Const.P.No.8 of 2009 by Mr. Justice Syed Sajjad Hussain Shah)*for permission to file review petitions against the said judgment. However, the applications were dismissed by a 14-Member bench of this Court, with a majority of 13 to 1, through judgment reported as **Justice Khurshid Anwar Bhinder and others Vs. Federation of Pakistan and another (PLD 2010 SC 483)**. However, the notices for contempt of Court issued to the Judges who had expressed regrets and repentance and either retired or tendered resignations were discharged; whereas the Judges, who were contesting notices and neither tendered resignations nor filed replies, or had not filed replies and/or had prayed for grant of time were directed to be proceeded against. In light of the said judgment, contempt proceedings were initiated against the Judges, including the petitioners. The petitioners contested the notices and *vide* judgment

reported as **Justices (R) Iftikhar Hussain Chaudhry's case** *(supra)* it was held that the petitioners *(respondents therein)*, despite being Judges of the superior Courts, were not immune from proceedings under Article 204 and the Contempt of Court law as far as committing contempt of this Court. It was directed that the cases be fixed for framing of charge(s) against the aforesaid respondents on 21.2.2011. The said judgment was challenged by the petitioners and others through Intra Court Appeals before a larger Bench of this Court. By means of judgment reported as **Justice Abdul Hameed Dogar's case** *(supra)* the appeals filed by Justice (R) Abdul Hameed Dogar *(I.C.A. No.9 of 2011)* and Justice (R) Sayed Zahid Hussain *(I.C.A. No.10 of 2011)*, on showing regret, were allowed and the proceedings for contempt of Court to their extent were terminated. However, the counsels of the other Judges against whom contempt proceedings were pending, were allowed two weeks' time to take instructions from them *(appellants therein)* in view of the orders/observations made. The remaining appeals were then disposed of vide judgment reported as **Justice Hasnat Ahmed Khan's case** *(supra)* wherein it was declared that the petitioners and other Judges *(appellants therein)* had ceased to be the Judges of the High Courts, therefore, they could not claim immunity from trial for contempt of Court under Article 204 of the Constitution read with relevant laws. After availing all the constitutional remedies, the petitioners remained silent till the year 2016 and ultimately filed the present petitions challenging the validity of the judgment in **Sindh High Court Bar Association's case** *(supra)* and other subsequent judgments, primarily on the ground that the said judgments are *per incuriam*.

3. In the following background, Mr. Ali Sibtain Fazli, learned counsel for the petitioners *(in Constitution Petitions No.1 & 2/2016)* referred to the judgment in **Sindh High Court Bar Association's case** *(supra)* and his opening salvo is that the petitioners were condemned unheard in the matter; besides, notwithstanding the fact that they had taken oath under the Oath Order, 2007, when the PCO, 2007 as well as Oath Order, 2007 were declared to be unconstitutional and void *ab initio*, they remained and continued to be the judges of the High Court under the Constitution, and the passing of Eighteenth Constitutional Amendment, whereby the PCO, 2007 as well as other instruments issued thereunder were not validated, had no effect upon their position as Judges of the High Court; therefore, the judgment cannot affect their right to be the Judges. Sh. Zamir Hussain, learned counsel for the petitioner *(in Constitution Petition No.10/2016)* has raised an additional argument that the judgment in **Sindh High Court Bar Association's case** *(supra)* was objective as far as others are concerned but subjective with regard to the Judges of the superior Courts, therefore, the Judges should not have been condemned unheard. According to him, the said judgment was a bold step and played a positive role in the socio-political history of the Country, which *(aspect)* has to be appreciated, but at the same time the positivity should not be used against the petitioners. In a nutshell the case of the petitioners is that it is the cardinal principle of natural justice that no one should be condemned unheard, but the petitioners were denied the said right; inasmuch as notices were issued to General (R) Pervez Musharraf, as is evident from para 145 of the judgment in **Sindh High Court Bar Association's case** *(supra)* but no such notice was issued to the petitioners. Further, this Court has unlimited jurisdiction to reopen, revisit or review any judgment earlier

pronounced to set the law correct, to cure injustice and to save abuse of process of law, especially when the judgment is *per incuriam*. Reliance in this behalf has been placed on the judgments reported as **Sindh High Court Bar Association's case** *(supra)* and **In Re.: Matter Regarding Pensionary Benefits of the Judges of Superior Courts (PLD 2013 SC 829)**. The judges of the superior Court can only be removed under Article 209 of the Constitution, which fact has been pointed out in the judgments in **Sindh High Court Bar Association's case** *(supra)* as well as **Justice Khurshid Anwar Bhinder's case** *(supra)* but despite that through the judgment reported as **Justice Hasnat Ahmed Khan's case** *(supra)* the petitioners were removed from their office by declaring them to have ceased to be Judges simply because they took oath under the PCO/Oath Order, 2007, which is a violation of Article 209 of the Constitution. It was further argued that it is a universal law and practice that the judges of superior Courts are never tried under the Contempt of Court laws. Reliance in this regard has been placed on the cases reported as **Mujibur Rahman Shami Vs. A Judge of the High Court (PLD 1973 Lah. 805)**, **K.L. Gauba ah 42 Vs. The Hon'ble the Chief Justice and Judges of the High Court of Judicature at Lahore & anr. (AIR 1942 FC 1)**, **States of Rajasthan Vs.Prakash Chand & ors. (AIR 1998 SC 1344)**, **Rachapudi Subba Rao Vs. The Advocate General, Andhra Pradesh (AIR 1981 SC 755) = (1991 Cri. Law J. 613)** and **Shri Harish Chandra Mishra and anr. Vs. The Hon'ble Mr. Justice S. Ali Ahmed (AIR 1986 Pat. 65)**.

4. First of all let us consider the question of issuance of notice to the Judges of the superior Courts in terms of the principles of *audi alteram partem* and natural justice. The question of issuance

of notices to the Judges **was** considered by the full Bench of this Court in **Sindh High Court Bar Association's case** *(supra)*, when after due consideration of facts and case-law, it was decided not to issue notice to them, relevant para wherefrom reads as under: -

> "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: -
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> > "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. … …
> >
> > 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…….".""

Then the said question as well as the arguments of the petitioners, identical to the arguments made in the instant case, were considered by another full Bench of this Court in **Justice Khurshid Anwar Bhinder's case** *(supra)* as is evident from the following portion of the said judgment: -

> "4. Mr. Wasim Sajjad, learned Senior Advocate Supreme Court entered appearance on behalf of Mr. Khurshid Anwar Bhinder in C.M.A. 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 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. … 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."

Mr. Farooq Amjad Meer, Dr. A. Basit and Sheikh Zamir Hussain made further arguments along this theme of lack of notice and took various other grounds too. The respective contentions/submissions were dealt with in detail and decided as under: -

> "24. First of all we intend to deal with the prime contention of Mr. Wasim Sajjad, learned Senior Advocate Supreme Court that in view of the provisions as enumerated in Article 188 of the Constitution and Order XXVI of the Supreme Court Rules these C.M.As. are maintainable and the applicants cannot be knocked out on sheer technicalities which has always been considered undesirable.
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> 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, C.P.C., scope whereof can neither be enlarged nor it can be farfetched in such a manner as argued by the learned Advocate Supreme Courts for the petitioners in view of the language as employed in Order XLVII, Rule 1, C.P.C. its application would be only up to that limited extent and it cannot be unlimited.

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.

42. … … 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. … … 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'.

44. It is also well acknowledged by now that "rules of natural justice are principles ingrained into the conscience of men. …" …… 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."

45. The concept of audi alteram 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.
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> 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. …"

As noted from the above paras, while dismissing the applications of the petitioners for filing review petitions, elaborate and extensive reasoning was given and in view of the judgment rendered therein, which is a judgment *in rem*, we do not find that the petitioners are entitled to be heard again in the instant petition, as far as ordinary adversarial litigation is concerned.

5. With regard to the submission of the learned counsel for the petitioners that the petitioners could not be removed from their office except under Article 209 of the Constitution and that the contempt notices also could not be issued to them, suffice it to say that in **Sindh High Court Bar Association's case** *(supra)* these aspects were dilated upon in the following terms: -

"122. … Thus, on 3rd November, 2007 certainly it was the first time in the history of Pakistan that the judiciary, instead of accepting or acquiescing in the situation as per past practice, acted boldly and independently and took the most ever needed step, which conspicuously lacked in the past. A seven-member Bench of this Court, constituted and convened in the evening of the fateful day after the issuance of Proclamation of Emergency, PCO No. 1 of 2007 and Oath Order, 2007, passed the restraint order in Wajihuddin Ahmed's case. This was the most striking distinction between the action of 3rd November, 2007 on the one hand and those of 12th October, 1999, 5th July, 1977, 25th March, 1969 and 7th October, 1958 on the other. In pursuance of the said order, a vast majority of the Judges of the superior courts rejected the actions of 3rd November, 2007 and did not make oath in pursuance with the order dated 3rd November, 2007 passed by a seven - member Bench of this Court in Wajihuddin Ahmed's case. The lawyers, members of the civil society, political activists, the print and the electronic media personnel and the general public played their role for upholding the rule of law and supremacy of the Constitution in the country. Abdul Hameed Dogar, J, and some other Judges violated the aforesaid order dated 3rd November, 2007 passed by a seven - member Bench of this Court in Wajihuddin Ahmed's case. These Judges, whether they were in this Court or in the High Courts, have all rendered themselves liable for consequences under the Constitution for their disobedience of the aforesaid order of 3rd November, 2007.

128. … In the first instance, the purported appointment of Abdul Hameed Dogar, J, or for that matter the appointments of other Judges have already been declared to be unconstitutional, illegal and void ab initio. Further, the above recital in the Notification, which is a contradiction in terms, stands nullified by the dominant intent and spirit of the Notifications, which was the restoration of the Chief Justice of Pakistan and other Judges to the position they were holding prior to 3rd November, 2007. It was a loud and clear recognition of the fact that the Chief Justice of Pakistan and all other Judges of the Supreme Court and High Courts continued to be such Chief Justice and Judges despite their unconstitutional, illegal and forcible removal from office in violation of Article 209

of the Constitution and the said position, on the same considerations, was reversed in totality. A wrong stood declared wrong with no mincing of words, for all times to come."

Ultimately it was held as under: -

"22. As a consequence thereof: - (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".

These aspects of the matter were again considered by this Court in **Justice Hasnat Ahmed Khan's case** *(supra)* and re-affirmed as under: -

35. Thus, in view of above background it is to be seen whether the appellants are still Judges so as to be liable to be dealt with under Article 209 of the Constitution or had ceased to be Judges after they had taken oath on 3.11.2007 under the PCO, 2007 read with the Oath Order, 2007, which, inter alia, provided that a person holding office immediately before the issuance of said instruments as a Judge of the Supreme Court, the Federal Shariat Court or a High Court would cease to hold office with immediate effect, particularly after the passing of the Eighteenth Constitutional Amendment whereby no validation was provided to the actions of 3.11.2007 because in the past, the Parliament had, on each such occasion, granted validation to such actions i.e. the extra-constitutional steps of 5.7.1977 were validated by the Parliament through the Eighth Constitutional Amendment whereas the extra-constitutional steps of 12.10.1999 were validated by the Parliament under the 17th Constitutional Amendment.

36. It is to be noted that much emphasis has been laid on behalf of the appellants that notwithstanding the fact that

indemnity/validity has not been granted to the unauthorized actions of the then Chief of Army Staff dated 3.11.2007, they continued to be the Judges in view of the observations of this Court, in pursuance whereof they were ordered to be dealt with under Article 209 of the Constitution and in the order dated 5.10.2010 though they were ordered to be proceeded under Article 204 of the Constitution but it was never held that they were no more Judges of the Supreme Court or the High Courts. Reliance in this behalf has also been placed on the stand taken by the Government of Pakistan in the statement reproduced hereinabove wherein reference of paragraph No.17 of the Sindh High Court Bar Association's case has been made. The arguments so advanced on behalf of the appellant as well as the Attorney General for Pakistan required to be examined in different context because in Sindh High Court Bar Association's case PCO as well as Oath Order, 2007 had been declared unconstitutional and void ab-initio, whereas in Khurshid Anwar Bhinder's case permission was not accorded to some of the applicants (Judges) who wanted to seek the review of the main judgment for expunging the observations of whatsoever nature made therein against them.

44. … However, under the so called proclamation of Emergency and PCO, 2007 read with Oath Order, 2007 some of the Judges including the appellants, who both expressly and impliedly agreed that under the new dispensation i.e. proclamation of emergency and PCO, 2007 they ceased to hold their offices under the Constitution, as such, made fresh oath under the PCO, foregoing their earlier appointments under the Constitution of 1973.

50. … Thus, all the Judges including the appellants, who opted to make oath under the said dispensation accepted that they ceased to hold office the moment the said instruments were promulgated, i.e. 3.11.2007. Admittedly, under PCO, 2007 appointment was not under the Constitution. They deviated not only from their appointments, but also from their oath. Mere making of fresh oath under the Constitution on its revival would make no difference. Notably, there is a marked distinction between the oath under the Constitution, and the oath under the PCO/Oath Order. In the former case, one takes oath to perform

one's functions in accordance with the provisions of the Constitution, whereas in the latter, one commits oneself to abide by the provisions of the PCO/Oath Order and the orders passed from time to time by the person issuing the said instruments. A Constitutional document is not an ordinary legislative instrument, rather it is the supreme law of the land, being an accord among the people. It is an instrument for running the affairs of the country. It governs the rights and obligations of the citizens. Even a child born today is a subject of the Constitution. Thus, appellants in presence of oath made under the Constitution accepted oath under PCO, 2007 and in this way violated their oath under the Constitution in letter and spirit.

It was finally held as under: -

65. As a result of above discussion appeals are disposed of as follows:-

(1) The appellants and others constitutionally are not holders of the office as Judges of the High Courts in absence of validation, rectification and legitimization of unconstitutional acts, deeds, omissions and commissions of the then Chief of Army Staff, General Pervez Musharraf (Retd.) whereby he imposed the martial law in the name of Emergency on 3.11.2007, which continued up to 15.12.2007 and the appellants because of making oath under PCO, 2007 read with Oath Order, 2007 ceased to hold the office because the PCO and the Oath Order, 2007 have been declared unconstitutional in Sindh High Court Bar Association's case and by legislative interference in Eighteenth and Nineteenth Constitutional Amendments no validation has been provided to such unconstitutional actions, omissions and commissions."

The petitioners contested the notices in **Justices (R) Iftikhar Hussain Chaudhry's case** *(supra)* and the questions formulated therein were as under: -

(i) Is it constitutionally permissible for this Court to proceed under Article 204 of the Constitution against Judges of the Supreme

Court and of the High Courts, for committing contempt of this Court?

(ii) If the aforesaid question is answered in the affirmative then, as a matter of propriety, should the Supreme Court proceed against the said Judges or should it, bearing in mind the status of the respondents as Judges of the Supreme Court and High Courts, discontinue these proceedings and discharge the notices issued to them?

(iii) If it is decided that the Constitution does not place restrictions on contempt proceedings against Judges and if it is also found that questions of propriety do not stop this Court from proceeding against the respondents under Article 204 of the Constitution, then is there sufficient material available before the Court to charge the respondents for committing contempt of the Supreme Court on account of disobedience of the order dated 3.11.2007?

The above noted questions were answered as under: -

(i) In the facts and circumstances of these matters, the Constitution and law does not prohibit proceedings under Article 204 of the Constitution against the respondents even though they may be Judges of the Supreme Court and the High Courts. We hold that they are not immune from proceedings under Article 204 and the Contempt of Court Ordinance V of 2003, for committing contempt of this Court.

(ii) Having considered the submissions of learned counsel as to the propriety of initiating contempt proceedings against the respondents and being fully conscious of the status of the respondents, we hold that in the circumstances of these matters, propriety requires that proceedings should be taken against the respondents and they, with the exception of Mr. Zafar Iqbal Chaudhry and Khurshid Anwar Bhindar, be put to trial in accordance with the aforesaid law.

(iii) Having considered the record, facts and circumstances and replies in these matters and after due consideration of the arguments advanced on behalf of respondent, we find that there is sufficient material available before us to justify charging the respondents

(other than Mr. Khurshid Anwar Bhinder and Mr. Zafar Iqbal Chaudhry,) for committing contempt of the Supreme Court on account of their disobedience of the order dated 3.11.2007 passed by a seven member Bench of this Court.

The remaining appeals were disposed of *vide* judgment in **Justice Hasnat Ahmed Khan's case** *(supra)* as under (@ para 65): -

(1) The appellants and others constitutionally are not holders of the office as Judges of the High Courts in absence of validation, rectification and legitimization of unconstitutional acts, deeds, omissions and commissions of the then Chief of Army Staff, General Pervez Musharraf (Retd.) whereby he imposed the martial law in the name of Emergency on 3.11.2007, which continued up to 15.12.2007 and the appellants because of making oath under PCO, 2007 read with Oath Order, 2007 ceased to hold the office because the PCO and the Oath Order, 2007 have been declared unconstitutional in Sindh High Court Bar Association's case and by legislative interference in Eighteenth and Nineteenth Constitutional Amendments no validation has been provided to such unconstitutional actions, omissions and commissions.

(2) The appellants, however, shall cease to hold office of the Judges of the High Court with effect from the date of passing of Eighteenth Constitutional Amendment. The Secretary Law, Government of Pakistan is hereby directed to issue necessary notifications that they ceased to hold the office with effect from the said date.

(3) As far as appellants and others are concerned, they shall be entitled for the service and pensionary benefits up to 20.4.2010 when Eighteenth Constitutional Amendment was passed. However, if ultimately they are found to be guilty for the contempt of court by this Court, their cases for affecting the recovery of pensionary benefits in future shall be dealt with accordingly.

(4) As appellants and others are not Judges of the High Courts, therefore, they cannot claim immunity for holding their trial for

contempt of Court under Article 204 of the Constitution read with relevant laws.

6. The judgments relied upon by the petitioners were previously referred to in **Justice Khurshid Anwar Bhinder's case** *(supra)* but were not followed by the 14-Member Bench of this Court being distinguishable. However, we would like to discuss them in detail, in order to satisfy the petitioners. In **Mujibur Rahman Shami's case** *(supra)* notices for contempt of court were issued to the petitioner No.1 *(therein)*, who then filed a petition for contempt of court against the sitting Judge of the High Court, which was heard by a 7-Member Bench of the High Court and was dismissed *in limine* holding that the petitioner had filed the said petition with an ulterior motive to harass the aforesaid judge and to pressurize him. If such petitions are encouraged then no Judge of a superior Court would be able to function freely because as and when he decides a case against a litigant there will at once be filed an application of the type. It was observed that in the same way that one High Court Judge cannot issue a writ to another Judge of the same Court, no process of contempt of Court can lie (for example) for taking action against a Judge for disobeying the order of another Judge. In **K. L. Gauba's case** *(supra)* the petitioner therein filed petition for contempt of Court alleging that the High Court Judges had committed contempt in refusing to him a certificate to file an appeal. The question for consideration before the Court was thus whether the Federal Court could take action for contempt of Court against the High Court for refusal o1 12 gant certificate of of hf appeal. In tant contxnt

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Even Mr. Gauba does not suggest punishment by fine or imprisonment; he would be content that the High Court should be served with an order to grant the certificate hitherto perversely or maliciously withheld. But what is that but to ask this Court to do by indirect means what it is admitted that it cannot do directly? The law of contempt of Court has at times been stretched very far in British India; but no one has ever contended that a Court could use its power to punish for contempt for the purpose of extending its jurisdiction in other matters." In **Prakash Chand's case** *(supra)* the powers and authority of the Chief Justice of the High Court were highlighted, *inter alia*, that the administrative control of the High Court vests in the Chief Justice alone; on the judicial side, however, he is only the first amongst equals; the Chief Justice is the master of the roster. Consequently, the direction given by a Judge of the High Court to issue show cause notice to the Chief Justice of the High Court *(Respondent No.2 therein)*, was quashed and set aside, being wholly unwarranted, unjustified and legally unsustainable. In **Rachapudi Subba Rao's case** *(supra)* the trial Court decreed the suit against the appellant/defendant *(therein)* who issued a notice to the Judge asking him to pay damages for, *inter alia*, deciding the case with bad faith and maliciously disordering the existing oral and documentary evidence. The notice was sent to the High Court for necessary action and ultimately contempt proceedings were initiated against the appellant and he was convicted for committing gross contempt of Court, which was maintained by the Supreme Court. In **Harish Chandra's case** *(supra)*, N.P. Singh, J., observed that "w*henever a contempt is committed in presence of a Judge of the Supreme Court or High Court it is not the contempt of the particular court in which such Judge is presiding but of the Supreme Court or the High Court, as the case may be. As such, when Section 16(1) says that "a Judge ... shall*

also be liable for contempt of his own court" it obviously does not refer to the Supreme Court or High Court. In respect of Supreme Court or High Court there is no question of any Judge being liable for contempt of his own court, in other words, the courtroom in which such Judge is presiding. Only a Judge of subordinate court can be said to have committed contempt of his own court, i.e., the court in which such judge is presiding. ... The framers of the constitution in order to maintain the independence of high judiciary kept them immune from the criticism in respect of their conduct even in the Parliament and Legislature of the State by saying so in Articles 131 and 211 of the Constitution. They prescribed a special procedure for their removal under Articles 124(4) and 217(1)(b)." It was further observed that "*there cannot be two opinions that Judges of the Supreme Court and High Courts are expected to conduct the proceedings of the Court in dignified, objective and courteous manners and without fear of contradiction it can be said that by and large the proceedings of the higher courts have been in accordance with well settled norms*." P.S. Sahay, J. observed that "*A Judge has every right to control the proceedings of the Court in a dignified manner and, in a case of misbehaviour or misconduct on the part of a lawyer proceedings in the nature of contempt can be started against the lawyer concerned. But, at the same time a Judge cannot make personal remarks and use harsh words in open Court which may touch the dignity of a lawyer and bring him to disrepute in the eyes of his colleagues and litigants*."

7. After considering the above referred judgments, we are of the view that in none of the cases, was there a specific order of the Supreme Court, issuing certain directions to the Judges of the superior Courts, which *(order)* had been violated by them. The ratio of

the above case-law is that the Judges of the High Courts are immune from action under the contempt of Court laws by another Judge of the same Court, on the application of a person who is/was a party to the proceedings pending/decided by a Judge of the High Court, with regard to a decision in that case, but in none of the cases has it been held that no proceedings could be initiated against a Judge of the High Court for violating the order of this Court. In the instant case, notices for contempt of Court were issued to the petitioners as well as other Judges for violating the order of this Court whereby a specific direction was issued to the Judges of the High Court not to take oath under the PCO or any other unconstitutional instrument. Sanctity has always been attached to a judicial order passed by this Court in a pending case and no one can be allowed to frustrate it, or refuse to accede to it or fail to follow a direction issued therein. Any person, who intentionally and deliberately violates any order of this Court, makes himself liable to be proceeded against and punished for contempt of Court. On any count and score, it cannot be presumed that a Judge of the High Court is immune from the consequences of violation or willful defiance of an order of this Court; if that were so, the whole judicial structure would be disturbed and fall to the ground, as the orders of this Court could not be implemented in letter and spirit. Thus, the said cases are of no use in advancing the cause of the petitioners, being distinguishable on facts as also on law.

8. With regard to the submission made by the learned counsel for the petitioners that the judgment in **Sindh High Court Bar Association's case** *(supra)* is *per incuriam*, it is to be noted that in the said judgment, while considering the validity of the judgments in **Tikka Iqbal Muhammad Khan v. General Pervez Musharraf and**

others (PLD 2008 SC 178) and **Tikka Iqbal Muhammad Khan v. General Pervez Musharraf, Chief of Army Staff, Rawalpindi and 2 others (PLD 2008 SC 615)** the Court observed that "*subsequently, another 7-Member Bench headed by Mr. Justice Abdul Hameed Dogar, Chief Justice of Pakistan, as then he was called, took up hearing the case of Tikka Iqbal Muhammad Khan and WATAN Party and decided the same on the principle of 'Salus Populi Supreme Lex' and granted that relief which was even not prayed by the petitioner. This judgment is/was, ex facie, per incuriam, coram-non-judice, illegal and unlawful. Later, a time barred Review Petition was filed by Tikka Iqbal Khan which was heard by 13-Member Bench and was dismissed, palpably to give impression that a larger Bench decided the matter to dilute the effect of a previous judgment handed down in case of Syed Zafar Ali Shah (PLD 2000 SC 869).*" At some other place it was observed that "*the learned counsel for the petitioners next submitted that the decisions in Tikka Iqbal Muhammad Khan's case were rendered in violation of the provisions of Articles 209 and 2A of the Constitution and were also per incuriam in view of the law laid down in Zafar Ali Shah's case wherein at page 1211 it was laid down in clear terms that the Judges of the superior judiciary enjoyed constitutional guarantee against arbitrary removal. They could be removed only by following the procedure laid down in Article 209 of the Constitution by filing an appropriate reference before the Supreme Judicial Council and not otherwise. There is force in the submissions of the learned counsel. The decision appears to have been rendered in haste to confer validity on the acts of 3rd November, 2007 and onward for the illegal and unlawful personal benefit of General Pervez Musharraf and for the illegal and unlawful personal benefit of the persons rendering it, without application of judicial mind.*" The Court,

ultimately held that "*the decisions in the cases of Tikka Iqbal Muhammad Khan granting validity to the actions of General Pervez Musharraf (Rtd.) were per incuriam, coram-non-judice, without any legal basis hence, of no legal consequences*". Further, the grounds and parameters for declaring a judgment to be *per incuriam* have been highlighted by this Court in the judgment reported as **Matter Regarding Pensionary Benefits of the Judges of Superior Courts (PLD 2013 SC 829)** as under: -

> "4. … … As it is a cardinal principle of justice, that the law should be worn by the Judge in his sleeves and justice should be imparted according to the law, notwithstanding whether the parties in a lis before the Court are misdirected and misplaced in that regard. Therefore, if any law which has been invalidly pronounced and declared by this Court, which in particular is based upon ignorance of any provisions of the Constitution, and/or is founded on gross and grave misinterpretation thereof; the provisions of the relevant law have been ignored, misread and misapplied; the law already enunciated and settled by this Court on a specific subject, has not been taken into account, all this, inter alia, shall constitute a given judgment(s) as per incuriam; and inconsistent/conflicting decision of this Court shall also fall in that category. Such decision undoubtedly shall have grave consequences and repercussions, on the State, the persons/ citizens, the society and the public at large as stated above. Therefore, if a judgment or a decision of this Court which is found to be per incuriam (note: what is a judgment per incuriam has been dealt with by my brother), it shall be the duty of this Court to correct such wrong verdict and to set the law right. And the Court should not shun from such a duty (emphasis supplied). … … In my candid view the approach to leave such a decision to stay intact shall be ludicrous and shall lead to drastic effects as indicated above. Rather in such a situation this Court, having special position in our judicature (judicial system as highlighted above) shall have the inherent, intrinsic and inbred power (jurisdiction) vested in it, (a) to declare a judgment per incuriam; (b) decline to follow the same as a valid precedent, (c) and/or to set it aside. For the exercise of

> jurisdiction in that regard and for the discharge of the duty as mentioned earlier, it is absolutely irrelevant and immaterial vide (via) which source it (decision) has come to the notice of the Court. The Court once attaining the knowledge of such a blemished and flawed decision has the sole privilege, to examine the same and to decide about its fate, whether it is per incuriam or otherwise. In this context, it may be mentioned, for example, if while hearing some case, it is brought to the attention of the Court by the member(s) of the Bar; or during the hearing of any matter, the Court itself finds an earlier judgment to be per incuriam; or if a Judge (Judge of this Court) in the course of his study or research, comes across any judgment which in his view is per incuriam or if any information through the Registrar of the Court is passed on to the honourable Chief Justice of the Court or to any other Judge (of this Court), by any member of the Bar, or the member of the civil society (any organization/group of the society) that a judgment is per incuriam (note: without the informant having any right or locus standi of hearing or the audience, until the matter is set out for hearing in the Court and the Court deems it proper to hear him), the Court in exercise of its inherent suo motu power and the duty mentioned above (emphasis supplied) shall have the due authority and the empowerment to examine such a judgment, in order to ascertain and adjudge if the law laid down therein is incorrect or otherwise. And if the judgment is found to be per incuriam, it shall be dealt with accordingly. In such a situation (as earlier stated) it shall not be of much significance, as to who has brought the vice of the judgment to the notice of the Court or through which channel it has reached there. Rather, the pivotal aspect, the object, the concern and the anxiety of this Court should be to examine the judgment and if it is per incuriam to set the law right with considerable urgency."

9. We have considered the judgment in **Sindh High Court Bar Association's case** *(supra)*, which is delivered by a 14-Member Bench of this Court, and find that the same is a well-reasoned judgment, wherein all the factual aspects, legal and constitutional provisions as also the case-law have been considered, dealt with and

correctly decided. The same was reconsidered and upheld by another 14-Member Bench of this Court in **Justice Khurshid Anwar Bhinder's case** *(supra)*.

Then again, the said judgments and the law laid down therein were reconsidered and upheld in **Justices (R) Iftikhar Hussain Chaudhry's case** *(supra)* and **Justice Hasnat Ahmed Khan's case** *(supra)*.

10. After applying the ratio of the above judgments on the facts of the instant case, we find that none of the grounds settled by this Court, as mentioned above, for declaring a judgment *per incuriam*, including that the judgment was invalidly pronounced; based upon ignorance of any provisions of the Constitution or law; founded on gross and grave misinterpretation thereof; or that the law already enunciated and settled by this Court on a specific subject has not been taken into account, are to be found in the judgments challenged through the instant petitions. We are not convinced, on account of any principle relevant for the purposes of rendering a judgment *per incuriam*, that the same could conceivably be attracted to the facts and circumstances of the instant case. Resultantly, we are not inclined to declare the above referred judgments *per incuriam.*

11. There is another aspect of the matter which is of considerable importance i.e. the maintainability of these petitions. In this context, it is held that the petitioners had the remedy of challenging the judgment, if they were aggrieved of the same, by filing review petitions, which they did attempted so to do but could not succeed. They were a party in **Khurshid Anwar Bhinder's case** *(supra)* and their respective submissions were rejected and the review applications were accordingly dismissed as being not maintainable;

besides observing that the judgment impugned, being in the supreme national interest, there hardly appeared any justification for review. Further, the petitioners contested the contempt notices in **Justices (R) Iftikhar Hussain Chaudhry's case** *(supra)* and then Intra Court Appeals in **Justice Hasnat Ahmed Khan's case** *(supra)* but without any measure of success. All the points raised in the said cases/judgments have been re-agitated through the present petitions. In such a situation, the petitions under Article 184(3) are absolutely incompetent and not maintainable. Where a person has/had the opportunity of filing a review or appeal against a judgment, and either files a review/appeal and fails, or does not avail that opportunity, or fails to become a party in any pending review/appeal filed by another person against the same judgment, then he has no right to re-agitate the matter through a petition under Article 184(3) *ibid*. Article 184(3) *ibid* is a constitutional provision which is meant for the purposes of enforcement of fundamental rights, where there is a question of public importance involved. It cannot be exercised as a parallel review jurisdiction by the court, especially when the remedy of review has already been availed or declined. Yes, a judgment of this Court can be considered to be *per incuriam* but it is for the Judges to revisit any such judgment, if and when pointed out by any person during the course of hearing of any other case. Such a finding would be premised on the Court finding the same judgment to be against any provision of the Constitution or the law, or the principle(s) already settled by a larger Bench of the Court. It is not the right of a person, who would have no *locus standi* under Article 184(3) of the Constitution, to file such a petition, particularly in the situation where the review jurisdiction has been invoked and the same *(review)* has been dismissed; thus, such judgment *(under review)* can never be challenged

by virtue of filing independent proceedings under Article 184(3) of the Constitution. This would be an abuse of the process of law and is absolutely impermissible. Resultantly, we do not find any merit in these petitions which are accordingly dismissed.

12. Above are the reasons for our short order of even date, whereby the titled petitions were dismissed.

CHIEF JUSTICE

JUDGE JUDGE

JUDGE JUDGE

JUDGE JUDGE

Islamabad, the
5th of January, 2018
Approved For Reporting
Waqas Naseer