IN THE SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

***Present*:**
Mr. Justice Tassaduq Hussain Jillani
Mr. Justice Nasir-ul-Mulk
Mr. Justice Mohammad Moosa K. Leghari
Mr. Justice Sheikh Hakim Ali
Mr. Justice Ghulam Rabbani

CIVIL REVIEW PETITIONS No. 45, 46, 47, 48, 50, 51, 52, 59, 60, 61, 62 of 2009 IN C.Ps. No. 778, 779, 878, CA No.166/09 & C.PS. 803, CMA Nos.63 & 64/08 IN CMA No.1674-75/08 IN CP No. NIL of 2008, Crl. R. P. No.22/09 IN Crl. O. P. 41 of 2008 AND C.M.A. NO. 1597 OF 2009 IN C.R.P. 59 & 60 of 2009
(On review from the judgments of this Court dated 25.2.2009 passed in the above captioned petitions)

C. R. P. Nos. 45 & 46 of 2009 IN C.P.Nos.778 & 779 of 2008

Federation of Pakistan — Petitioner
(in both cases)

Versus

Mian Muhammad Nawaz Sharif and others — Respondents
(in both cases)

For the petitioner : Agha Tariq Mehmood Khan, DAG
(in both petitions)

For respondent No.1: Mr. Abid Hassan Minto, Sr.ASC with
(in both petitions) Mr. Mehr Khan Malik, AOR (in CRP 45/09)

For Respondents No.2-5:Nemo.
(in both petitions)

For Respondent No.6: Dr. Mohyuddin Qazi, Sr. ASC with
(in both petitions) Mr. Ejaz Muhammad Khan, AOR

C. R. P. Nos. 47 & 48 of 2009 IN C. P. Nos. 905 & 878 of 2008

Federation of Pakistan — Petitioner
(in both petitions)

Versus

Syed Khurram Shah & others — Respondents
(in both cases)

For the petitioner : Agha Tariq Mehmood, DAG with
(in both cases) Mr. Arshad Ali Ch. AOR

For respondent No.1: Mr. Ahmed Raza Qasuri, Sr. ASC
(in both cases) Mr. Ejaz Muhammad Khan, AOR

For Respondent No.2: Khawaja Haris Ahmed, ASC with
(in both cases) Mr. Mehr Khan Malik, AOR

For Respondent Nos.3-5 Nemo. (in both cases)

C. R. P. No. 50 of 2009 IN C.P.No.803 of 2008

Speaker of Provincial Assembly Province of Punjab — Petitioner

Versus

Syed Khurram Shah and others — Respondents

For the petitioner : Mr. Muhammad Raza Farooq, ASC and
Mr. Ashtar Ausaf Ali, ASC with
Mr. Arshad Ali Ch. AOR

For respondent No.1: Mr. Ahmed Raza Qasuri, Sr. ASC with
Mr. Ejaz Muhammad Khan, AOR

For respondent No.2: Khawaja Haris Ahmed with
Mr. Mehr Khan Malik, AOR

For respondent Nos.3-5: Nemo.

For respondent No.6: Agha Tariq Mehmood, DAG

C.R. P. No. 51 of 2009 IN CMA No.64/08 IN CMA No.1674/08 IN CP No.Nil of 2008

Shakeel Baig — Petitioner

Versus

Noor Elahi and others — Respondents

For the petitioner : Mr. A. K. Dogar, ASC with
Mr. Arshad Ali Ch. AOR

For respondent No.1 Dr. Mohyuddin Qazi, Sr. ASC with
Mr. Ejaz Muhammad Khan, AOR

For respondent No.2: Mr. Abid Hassan Minto, Sr. ASC with
Mr. Mehr Khan Malik, AOR

For respondents No.3-5: Nemo.

For respondent No.6: Agha Tariq Mehmood, DAG

C.R. P. No.. 52/09 IN CMA No.63/09 IN CMA No.1675/08

Mehr Zafar Iqbal — Petitioner

Versus

Syed Khurram Shah and others — Respondents

For the petitioner : Mr. Muhammad Akram Sheikh, Sr. ASC
Mr. Arshad Ali Ch. AOR

For respondent No.1 Dr. Mohyud Din Qazi, Sr. ASC with
Mr. Ejaz Muhammad Khan, AOR

For respondent No.2: Mr. Abid Hassan Minto, Sr. ASC with
Mr. Mehr Khan Malik, AOR

For respondents No.3-5: Nemo.

For respondent No.6: Agha Tariq Mehmood, DAG

C. R.P. Nos. 59 & 60 of 2009 IN C.P.Nos.778 & 79 of 2008 a/w CMA No. 1130 & 1551 of 2009 & C.M.A. No. 1597 of 2009

Mian Muhammad Nawaz Sharif — Petitioner

Versus

Federation of Pakistan and others — Respondents

For the petitioner : Mr. Abid Hassan Minto, Sr. ASC with
Mr. Mehr Khan Malik, AOR (in both cases)

For respondent No.1: Agha Tariq Mehmood, DAG

For respondent Nos.2-5: Nemo.

For respondent No.6: Dr. Mohyud Din Qazi, Sr. ASC with
Mr. Ejaz M. Khan, A0R (in both cases)

For the applicant: (in C.M.A. 1597/09) Mr. Ahmed Raza Qasuri, Sr. ASC

For the applicant: Mr. Shahid Orakzai (in person in CMAs)

C. R.P. Nos. 61 & 62 of 2009 IN C.P.Nos.878 & C.P.No.905/08 (CA No.166/09) a/w CMA No.1525 of 2009

Mian Muhammad Shahbaz Sharif — Petitioner

Versus

Federation of Pakistan and others — Respondents

For the petitioner : Khawaja Haris Ahmed, ASC
Mr. Mehr Khan Malik, AOR (in both cases)

For respondent No.1: in CRP No.61 & 6 in CRP No.62/09 Agha Tariq Mehmood, DAG

For respondent Nos.2-4: Nemo. (in both cases)

For respondent No.5: In CRP 61 & 1 in CRP 62/09 Dr. Mohyud Din Qazi, Sr. ASC with
Mr. Ejaz M. Khan, AOR

For the Applicant: Mr. Shahid Orakzai (in person in CMA)

Crl. R.P. No. 22 of 2009 IN Crl.O.P.No.41/09 IN CP No.657-L of 2008

Javed Mehmood — Petitioner

Versus

Syed Khurram Shah and another — Respondents

For the petitioner : Mr. Muhammad Raza Farooq, ASC with
Mr. Mehr Khan Malik, AOR

For respondent No.1: Mr. Ahmed Raza Qasuri, Sr. ASC

On Court's Call: ***Sardar Muhammad Latif Khan Khosa***
Attorney General for Pakistan.

Dates of hearing: 11.05.2009 to 26.5.2009

J U D G M E N T

Tassaduq Hussain Jillani, J.-

Civil Review Petitins No. 59 & 60 of 2009 filed by Mian Muhammad Nawaz Sharif:

1. Petitioner Mian Muhammad Nawaz Sharif filed his nomination papers for N.A. 123 Lahore. Initially out of the other two contesting candidates namely Noor Elahi and Mian Ikhlaq Ahmad Guddu, the latter filed an objection petition before the Returning Officer questioning the candidature of the petitioner. The objection petition was dismissed vide order dated 15.5.2008, inter alia, on the grounds that the objection petition had not been supported by any documentary evidence despite the opportunities given to the objector. This order was challenged in appeal before the Tribunal comprising of two learned Judges of the High Court. However, on 27.05.2008 the said objector withdrew his appeal but the same day the other candidate Noor Elahi filed an application under Order 1 Rule 10 CPC with the prayer that he be allowed to be transposed as appellant. He also raised similar objections. This application was dismissed with the observation that he

may file a separate appeal, if so advised. Later on, he filed a time barred appeal on 28.05.2008 (last date for filing appeal was 24.05.2008). In the meanwhile, one Syed Khuram Shah had also filed an application dated 26.05.2008 under section 14(5-A) of the Representation of Peoples Act, 1976 [hereinafter referred to as 'the Act'] and laid information about petitioner-respondent alleging that he was disqualified in the light of the said information. The Election Appellate Tribunal (comprising of two learned Judges of the Lahore High Court) passed a split judgment on 30.05.2008. One of the learned Judges held that petitioner was qualified to contest elections because the factum of having been granted pardon in terms of Article 45 of the Constitution was not disputed by Deputy Attorney General for Pakistan which had the effect of complete exoneration from the convictions and sentences awarded. However, the other learned Judge was of the view that pardon under the afore-referred provision could not wash away conviction and its consequences. On account of this divergence of opinions, the matter was referred to the Chief Election Commissioner. The latter, vide order dated 01.06.2008, held that since the appeals of the objectors had not been disposed of within the period specified in the election schedule, the same were deemed to have been dismissed in view of section 14(6) of the Act. As per the election schedule, 31st May of 2008 was the last date for deciding appeals against the acceptance of nomination papers by the Election Tribunals.

2. Aggrieved by the order of the Chief Election Commissioner dated 01.06.2008, respondent Noor Elahi filed Writ Petition No. 6468 of 2008 and Syed Khuram Shah respondent filed Writ Petition No. 6469 of 2008. Both these petitions were accepted by a Full Bench of the Lahore High Court comprising of three Judges vide judgment dated 23.06.2008, inter alia on the ground that petitioner-respondent was disqualified to contest the elections as (a) he was a convict in terms of the judgment of Accountability Court in Reference No. 2 of 2000 dated 22.07.2000 under section 9-A (v) of the National Accountability Ordinance; (b) he had scandalized, abused and ridiculed the judiciary; and (c) he had sworn a false affidavit attached with his nomination papers to the effect that he was qualified to contest the elections. The

main judgment was delivered in W.P. No.6468 of 2008 and connected writ petition No.6469 of 2008 was allowed by a short order to the effect, "*for the reasons mentioned in our detailed order of even date passed in W.P. No.6468 of 2008, this petition is allowed*". The constitutional petition was allowed and the petitioner was declared disqualified to contest the elections on the ground that the 'Presidential Pardon' granted to petitioner under Article 45 of the Constitution did not exonerate him from the sentence and conviction, more so when he did not produce the order of pardon; that he stood convicted in NAB Reference No.2 of 2000 vide judgment dated 22.07.2000 and sentenced to 14 years R.I. and disqualified to be elected or chosen as member of any public office; that he had scandalized the judiciary and that he had sworn false affidavits at the time of filing nomination papers that he was qualified to contest the elections. Having held so the Court set aside the order of the Returning Officer dated 15.05.2008, that of the Tribunal dated 31.05.2008 as also of the Chief Election Commissioner dated 01.06.2008.

3. As petitioner had not appeared before the High Court, the Federation of Pakistan challenged the afore-mentioned judgments of the High Court through separate civil petitions for leave to appeal (C.P. No. 778 of 2008 in W.P. No.6468 of 2008 and C.P. No. 779 of 2008 in W.P. No. 6469 of 2008) and both the petitions were dismissed by two separate judgments of even date which are sought to be reviewed in these petitions.

4. Mr. Abid Hassan Minto, Sr. ASC, learned counsel for the petitioner made following submissions:-

(i) That the judgment is ex-parte and findings of fact have been rendered against the petitioner without hearing him which is an error apparent on the face of record within the meaning of Order XLVII Rule 1 of the C.P.C. Petitioner's non-appearance was for a just cause i.e. the rule of law and independence of judiciary which was acknowledged even in the judgment under review in Paras 29 and 30. While taking note of the unconstitutional imposition of the "State of Emergency" which prompted the petitioner not to accept

the illegal removal of judges and appointment of judges through P.C.O., learned Court described the said dispensation in the judgment under review as *"enforced by a brutal force, by deviating from constitutional provisions,"*, yet it did not appreciate the high moral ground of petitioner's commitment and instead drew adverse presumptions against the petitioner. As head of one of the main stream political parties in the country, he along with all the party candidates for National and Provincial Assemblies took a collective oath to launch a movement against the imposition of emergency rule, unconstitutional removal of superior judiciary and induction of judges through Provincial Constitutional Order and for restoration of the judiciary. Petitioner believed that actions taken on 3rd of November, 2007 against judiciary not only had the effect of giving a serious blow to its independence but also to the public perceptions about this august institution. However, the learned Judges misconstrued petitioner's objectives and attributed it to disrespect for judiciary. Ultimately petitioner's principled stand stood vindicated by the turn of events: first when a large number of Judges (of High Courts and the Supreme Court) who were deposed on 3rd of November, 2007, were brought back by an executive order in August and September, 2008 and second when the Hon'ble Chief Justice and the remaining Judges were restored again by an executive order on 22nd of March, 2009. These developments, the learned counsel contended, have washed away the effect of this Court's judgment in Tika Iqbal's case (PLD 2008 SC 178).

(ii) That as the Court in ex-parte proceedings has given conclusive findings against petitioner on matters which entailed factual enquiry and as the same has adversely affected petitioner's fundamental rights, the conventional view of limited scope of review jurisdiction should not

restrain this Court to decide all the issues raised in this petition to ensure substantial justice.

(iii) That the powers of the Election Appellate Tribunal in terms of section (5) and (5-A) of the Act are time bound and can only be exercised within the period prescribed in the election schedule issued by the Election Commission of Pakistan for scrutiny and once that stage is over, it becomes functus officio. The courts fell in error in not appreciating that the order of the Chief Election Commissioner dated 01.06.2008 to the effect that respondent's appeal (against the acceptance of nomination papers of petitioner) was deemed to have been dismissed by operation of law was in accord with the mandate of section 14(6) of the Act and there was no patent illegality or exceptional circumstance to warrant interference in constitutional jurisdiction of the Court under Article 199 of the Constitution. The jurisdiction of the Appellate Tribunal contemplated under sub-section (5A) of section 14 of the Act enures only till such time as the Tribunal is functioning under the preceding sub-section (5) of the said section and as the time limit within which the appeal had to be decided under these provisions (by virtue of Schedule issued by the Election Commission under section 11 of the Act) had already lapsed, the respondent's appeal could not remain pending beyond the said period. In accepting the constitution petitions against the order of the Chief Election Commissioner, the learned High Court as also this Court have overlooked these mandatory provisions of law as mentioned in Para (iii above).

(iv) That the constitutional jurisdiction has been exercised under Article 199 of the Constitution on the application of a party who was not aggrieved person (Khuram Shah) and the other petition by a candidate (Noor Elahi) who did not file appeal within time (against the order of the Returning Officer dated 15.5.2008). He entered the arena only when a

rival candidate Mian Ikhlaq Ahmad @ Guddu decided to withdraw the appeal before the Election Tribunal and that too at a time when the period within which appeal had to be filed was already over. To overcome the issue of limitation, he styled the appeal as an application in terms of sub section (5-A) of section 14 of the Act. But even this application/objection had to be decided within the prescribed election schedule and could not go beyond that.

(v) That in the judgment under review the Court by creating a distinction between an appeal filed against the acceptance of nomination papers under sub-section (5) and laying information/petition under sub-section (5-A) of section 14 of the Act went on to declare that though the appeal under the former provision is time bound (to be decided within the period given in the Schedule announced by the Election Commission), yet the petition under sub-section 5-A need not be decided within the period given in the election schedule and a "reasonable time" should be given to decide the said petition. This observation, it was contended, besides being against the mandate of law would lead to confusion. It would have the effect of disturbing the entire election schedule which is against the constitutional and legislative intent as expressed in Article 225 of the Constitution read with sections 11 and 14(6) of the Act.

(vi) That in view of Article 225 of the Constitution read with section 11 of the Act, an election dispute could only be raised before an Election Tribunal constituted under the latter law and the High Court in constitutional jurisdiction could not interfere. This is in line with the following judgments of this Court reported in Election Commission of Pakistan through its Secretary v. Javaid Hashmi and others (PLD 1989 SC 396), Ghulam Mustafa Jatoi v. Addl. District & Sessions Judge/Returning Officer N.A. 158, Naushero Feroze and others (1994 SCMR 1299), Let. Gen.

(R) Salahuddin Tirmizi v. Election Commission of Pakistan (PLD 2008 SC 735 at 763).

(vii) That after dismissal of appeal by the Chief Election Commissioner, both the respondents i.e. Noor Elahi in Writ Petition No. 6468 of 2008 and Syed Khuram Shah in Writ Petition No. 6469 of 2008 had remedies available under the law i.e. respondent Noor Elahi being a candidate could file the election petition under section 52 of the Act, whereas Syed Khuram Shah not being a candidate could file the petition under section 76-A of the said Act.

(viii) That the learned Judges have misconstrued the meaning and import of "Pardon" granted in terms of Article 45 of the Constitution. "Pardon" according to learned counsel, has the effect of washing all the consequences of conviction i.e. the sentence, the stigma, the disqualification, if any. The convictions and sentences awarded under the NAB Ordinance vide judgment dated 22nd of July, 2000 as also in the hijacking case dated 06.04.2000, stood annulled by the grant of 'pardon' which was never disputed either by the respondent-objectors or by the Federal Government. "Pardon" in the instant case is all embrasive. It was neither conditional nor limited and the very fact that after the pardon he was released from jail where he was undergoing sentences pursuant to conviction in two cases is indicative of the fact that 'pardon' was complete and in all the cases. 'Pardon' not only washes away the stigma attached with conviction but also frees the person of any liability. In support of the submission made, the learned counsel relied on EX PARTE GARLAND (71 U.S. 333 (Wall), Knote v. United States (95 US 149), Black's Law Dictionary, Kehar Singh and another etc v. Union of India and another (AIR 1989 SC 653), Muhammad Asghar v. Government of Sind through the Chief Secretary (PLD 1977 SC 212), Abdul Malik v. The State and others (PLD 2006 SC 365).

(ix) That although in the judgment under review it has been declared that petitioner is disqualified in terms of Article 62, 63 of the Constitution read with section 99 of the Act, yet since no specific clauses of the afore-mentioned Articles have been mentioned, the finding would be deemed to have been rendered under section 99 of the Act. He added that these findings are not sustainable for following reasons:-

(a) Any declaration in terms of Article 62(f) that a person is not qualified to be elected or chosen as a member of Majlis-e-Shura (Parliament) because he is not sagacious, righteous and non-profligate and honest and '*ameen*' has to be preceded by a factual enquiry which exercise was neither done by the two courts nor it could have been done in the realm of jurisdiction which they were exercising i.e. under Article 199 of the Constitution.

(b) That Article 63(h) and (l) are inconsistent inasmuch as in the former provision, a person shall be disqualified from being elected as member of the Parliament if he has been convicted by a court of competent jurisdiction on a charge of 'corrupt practice', 'moral turpitude' or 'misuse of power or authority under any law for the time being in force', whereas in terms of clause (l) the wording is that a person shall be disqualified if he is found guilty of a 'corrupt or illegal practice under any law for the time being in force, unless a period of five years has elapsed from the date on which that order takes effect'. The former provision was inserted by Legal Framework Order 2002 and the disqualification in the event of conviction (on charges of corrupt practice, moral turpitude or misuse of power or authority) is not time bound whereas in the latter provisions (which is the original provision in the constitution) the term used is 'found guilty of a

corrupt or illegal practice' and the same is time bound i.e. after lapse of a period of five years of conviction, the disqualification would not enure. This inconsistency, the learned counsel contended, has to be reconciled with the recognized principles of constitutional interpretation and a provision which is in consonance with the over all constitutional scheme should give way to the latter provision inserted by a Chief Executive during the period when the Constitution was in "abeyance". In support of the contention, the learned counsel relied on a judgment of this Court in Khurshid Vs. The State (PLD 1996 SC 304)

(c) That the conviction under the NAB Ordinance dated 22nd of July, 2000 in so far as it disqualified the petitioner for a period of 21 years is ultra vires of Article 63(l) which stipulates disqualification for a period of five years after conviction.

(d) That in the judgment under review, the Court has found the petitioner to be guilty of breach of covenant as according to it the petitioner did not abide by the covenant in terms of which he was granted 'pardon'. This finding, the learned counsel contended is conjectural as neither any material was placed before the Court i.e. 'pardon' order or any other document nor it was the case of the Federal Government at any stage during the election process or before the High Court or before this Court.

(e) That mere pendency of suits filed by the banks for recovery of loan would not warrant a finding that the petitioner was a defaulter to entail disqualification. A person can only be declared as defaulter for purposes of disqualification only if

there is a conclusive judgment by a court of competent jurisdiction to the said effect.

(f) That the Court has fallen in error in giving certain findings/observations on a miscellaneous application (C.M. No. 1551/09) filed by one Shahid Orakzai who was neither an aggrieved person nor a party before the High Court. Even otherwise the observation that since (according to the Court) petitioner did not mention about the pendency of contempt proceedings against him in the affidavit filed before the Returning Officer, he is disqualified to contest, is without any factual premise as no such proceedings were pending against him.

(x) That in rendering the judgment, the Court has been influenced by formulations/considerations which are non-existent in the judgment of the High Court dated 26.06.2008. The learned counsel made a particular reference to Para-13 of the impugned judgment wherein the formulations framed on which the Court proceeded to render findings included, 'recusal', 'P.C.O. Judges', 'convictions', '21 years disqualification', 'breach covenants', 'unpaid loans', 'bank suits', 'propagating opinion against judiciary', 'pending contempt case-false declaration', 'miscellaneous application to C.E.C.', 'unrefuted allegations'. This feature of the judgment under review, according to the learned counsel, is by itself sufficient to constitute an error in the face of record warranting interference. The jurisdiction of this Court is circumscribed by the Constitution and law and it has to remain within the parameters of said jurisdiction. The learned Court while passing the judgment under review has made observations which had no nexus with the judgment of the High Court.

5. The learned counsel for the petitioner, Mr. Muhammad Akram Sheikh, ASC in Civil Review Petition No. 52 of 2009 (in C.M.A. No. 63/09 and CMA No. 1675/08 in C.P. Nil/08) submitted that the applicant had filed an application requesting for recusal of the judges who decided the case and for constitution of an appropriate bench with a view to ensure fair hearing but the same has been misconstrued and observations have been made against the applicant which are not warranted in law and are based on premises which is factually incorrect. Praying for setting aside the judgment under review and expunging the remarks recorded, he made following submissions:-

(i) That to dub the application filed by the petitioner as "conspiracy" is an error on the face of record and warrants interference.

(ii) That the findings rendered cannot be sustained as those tantamount to building an edifice without factual foundations.

(iii) That the applicant was motivated by higher principles and in no manner intended to insinuate any derogatory or contemptuous plea rather certain jurisprudential issues were raised in support of the prayer made.

(iv) That the "institution of recusal" is as old as the history of jurisprudence and to dismiss it on grounds which found favour in the judgment under review were rather conjectural and as the applicant had moved the application for bona fide reasons burdening him for filing the application with a cost of Rs.100,000/- or in lieu thereof to suffer three months S.I. is not only untenable in law but unprecedented.

(v) That the observations made in Para-12 of the judgment under review that counsel for the applicant namely Mr. Muhammad Akram Sheikh, Sr. ASC wanted to become a party is factually incorrect and constitute an error warranting interference.

(vi) That the review jurisdiction of this Court emanates from Article 188 of the Constitution and it cannot be circumscribed by the rules framed under it which is a sub-constitutional document and cannot override the mandate of the constitution.

6. Mr. A.K. Dogar, learned counsel for the petitioner in Civil Review Petition No. 51 of 2009 (in C.M.A. No. 64 of 2008 and C.M.A No. 1674 of 2008 in C.P. No. NIL of 2008) submitted that petitioner was an applicant before the High Court in W.P. No. 6468 of 2008 filed by Noor Elahi, respondent-candidate) and petitioner before this Court and the only prayer made was that he being an elector of the constituency in which petitioner Muhammad Nawaz Sharif had filed his nomination papers and latter's seconder had a vested interest, right to be heard because being proposers and seconders under the law (section 12 of the Act) they had vested right to ensure that the person they have proposed is dealt with as mandated in law. But his application was summarily dismissed by the learned High Court and even by this Court for reasons which cannot be countenanced in law. Seeking review of the judgment, he made following submissions:-

(i) That the Court concurred with the view of the learned High Court with regard to petitioner's application merely on the ground that since the candidate himself (Mian Muhammad Nawaz Sharif petitioner) had not appeared to defend his candidature, the allegations levelled stood proved and the applicant (elector-seconder) had no locus standi to be heard. This reasoning according to learned counsel is not tenable and tantamount to condemning someone without hearing him. An order passed without hearing is a void order and is an error apparent on the face of record. In support of the submissions made, he relied on a judgment of this Court in

Commissioner of Income Tax East Pakistan v. Fazalur Rehman (PLD 1964 SC 410).

(ii) That while passing the judgment under review, this Court fell in error in not appreciating that the High Court could not substitute its own opinion in constitutional jurisdiction with that of a Tribunal of competent jurisdiction i.e. the Chief Election Commissioner. In support of the submissions made, the learned counsel relied on Shah Jahan v. Syed Amjad Ali, Hawaldar and others (2000 SCMR 88), Umar Daraz Khan v. Muhammad Yousaf and others (1968 SCMR 880) and The Murree Brewery Co. Ltd v. Pakistan through the Secretary to Govt of Pakistan, Works Division (PLD 1972 SC 279).

(iii) That a void order can be challenged in collateral proceedings and a party against whom an order without jurisdiction is passed may ignore it or may not have it formally set aside in appeal or revision under the statute which it has purportedly made and this fact will not disentitle him from challenging it in collateral proceedings. In support of the contention, the learned counsel relied on Ali Muhammad v. Hussain Bakhsh and others (PLD 1976 SC 37), Ch. Altaf Hussain and others v. The Chief Settlement Commissioner (PLD 1965 SC 68), Federation of Pakistan through the General Manager N.W.Railway Lahore v. Ali Ihsan (PLD 1967 SC 249) and Malik Asad Ali v. Federation of Pak through Secretary Law, Justice & Parliament Affairs, Islamabad and others (PLD 1998 SC 161).

(iv) That the effect of 'pardon' under Article 45 of the Constitution is that the guilt is washed away and in the eyes of law, the offender is as innocent as if he has never committed the offence. Reliance was placed on Ex Parte Garland (4 Wall 333-18 L.Ed.366).

Quoting from Halsbury's Law of England, 2nd Ed. Page 479, the learned counsel contended that the effect of 'pardon' is to clear the person from all infamy stigma and consequences of the offence for which the said 'pardon' has been granted and all statutory or other disqualifications which were the result of conviction are removed. The import of this power of the President has been commented upon by this Court in Bhai Khan v. The State (PLD 1992 SC 14) and Abdul Malik v. the State (PLD 2006 SC 365 at 388).

(v) That both the appeals i.e. filed by Noor Elahi respondent and the petition/laying of information by Khuram Shah were not only time barred, but since the same had not been decided within the period prescribed in law, the Chief Election Commissioner had rightly declared the same to have been dismissed by operation of law which could not have been interfered with by the High Court in writ jurisdiction.

(vi) That this Court has not decided the question of recusal correctly and it merits interference.

7. Agha Tariq Mehmood, Deputy Attorney General (in Civil Review Petition No. 45, 46 of 2009) while assailing the judgment under review, made following submissions:-

(i) That the appeal filed by Noor Elahi respondent had rightly been dismissed by the Chief Election Commissioner and the learned High Court could not have interfered with the order passed with jurisdiction.

(ii) That since the appeal against acceptance of nomination papers in terms of sub-section (5) of section 14 of the Act had to be decided within the election schedule announced by the Chief Election Commissioner, the petition filed by respondent

Khuram Shah under sub-section (5) of section 14 of the Act could not have gone beyond the election schedule which issue has not been correctly appreciated by this Court in proper perspective and in the light of the law laid down.

(iii) That the Federation of Pakistan decided to challenge the judgment of the High Court in C.P. Nos. 778 & 779 of 2008 as it was of the view that petitioner Mian Muhammad Nawaz Sharif had a fundamental right guaranteed under Article 17 of the Constitution to contest the elections of which he had been deprived of by the High Court and this Court has not adverted to this aspect in rendering the judgment under review.

(iv) That the judgment of the learned High Court also of this Court insofar as they annulled the order of the Returning Officer and that of the Chief Election Commissioner passed in favour of petitioner accepting his nomination papers had the effect of disturbing the election schedule announced by the Chief Election Commissioner in terms of section 11 of the Act read with Article 225 of the Constitution.

(v) That although the document of pardon may not have been produced by anyone, yet, Article 45 of the Constitution talks of sentence and reprieve when a 'pardon' is granted and does not specifically provide for annulling the conviction.

8. Dr. Mohyuddin Qazi, Sr. ASC, learned counsel for the respondent, Noor Elahi (who was a candidate) supported the judgment under review and submitted as follows:-

(i) That since Mian Muhammad Nawaz Sharif has entered appearance and filed two civil review petitions (bearing Nos. 59 & 60 of 2009), the other two petitions filed by the Federation of Pakistan and

the connected ones have become infructuous and they be disposed of accordingly.

(ii) That the petitioner has challenged his conviction in the hijacking case by filing Crl. Petition No. 200 of 2009 which by itself amounts to his admission that the conviction in the said case is still in the field and therefore he has rightly been disqualified to contest the elections. Even otherwise, the concurrent judgments declaring him disqualified are unexceptionable for following reasons:-

a. The convictions and sentences awarded in two cases i.e. the case under the National Accountability Bureau Ordinance and the hijacking cases have not been annulled by any appellate forum.

b. That petitioner is a defaulter to the tune of Rs.2.48 billion as is evident from the bank statement of the concerned bank which was taken note of by this Court in the judgment under review.

c. That petitioner filed his nomination papers originally in the general elections and his nomination papers for N.A. 120 Lahore were rejected on 3.12.2007 by the Returning Officer. The said order was not challenged in appeal under section 14(5) of the Act and instead he filed a representation before the Chief Election Commissioner which too was dismissed on 17.12.2007 with the observation that he had the remedy of appeal but he never filed any appeal.

d. That petitioner filed a false affidavit when filing his nomination papers for NA-123-II Lahore on 13.05.2008 to the effect that he was qualified

to contest the elections notwithstanding the afore-referred convictions and bank default.

(iii) That the plea of "Pardon" taken by Mian Muhammad Nawaz Sharif petitioner before this Court is not tenable first because the document of "Pardon" was never produced before any Court and second because the power to "Pardon" is qualified by, *"reprieve and respite, and to remit, suspend or commute any sentence"* and does not include the power to annul a conviction and its other consequences.

(iv) That the jurisdiction under sub section (5) of section 14 of the Act is distinct from the one contemplated in sub-section (5-A) of the said section as while the former provision is time bound, the latter provision is not time bound with the effect that the enquiry initiated under the latter provision can go beyond the period prescribed by the election schedule to decide the appeal under the former sub-section.

(v) That Article 225 of the Constitution is not relevant because the said Article relates to election disputes in the post election period and pre-election disputes in the facts and circumstances of this case could only be agitated by invoking Article 199 of the Constitution. Reliance was placed on the cases reported as Muhammad Anwar v. Muhammad Akbar (PLD 2000 SC 52) and Intesar Hussain Bhatti v. Vice Chancellor University of Punjab Lahore and others (PLD 2008 SC 313).

(vi) That the remedies available under sections 52 and 76-A of the Act are also of no avail to the petitioner as under both these provisions the election of a returned candidate could be challenged whereas Noor Elahi wanted to challenge the eligibility of Mian Muhammad Nawaz Sharif to contest the elections and the order passed by the Chief Election

Commissioner wrongly declaring him to be qualified to contest the elections.

(vii) Defending he right of Noor Elahi respondent-writ petitioner, the learned counsel submitted that Noor Elahi had filed an application to be transposed as appellant under sub-section (5) of section 14 of the Act read with sub-section (5-A) as the earlier appellant namely Mian Ikhlaq Ahmad @ Guddu had been won over and he withdrew the appeal. The delay in filing the appeal is also attributable to this circumstance. But the said delay was condoned by the Election Tribunal in terms of Para-2 of the judgment and therefore no adverse inference should be drawn for delay in this regard. Even otherwise the learned counsel contended that Noor Elahi had remedy under sub-section (5-A) of section 14 and the said provision being not time bound, the Appellate Tribunal was not constrained by the time limit provided under sub-section (5).

(viii) That this Court while exercising powers of review

case for exercise of the said jurisdiction, this Court may not interfere with the judgment under review. Reliance was placed by him on a judgment of this Court in Commissioner of Income Tax Peshawar v. Messrs Gul Cooking Oil and Vegetable Ghee (Pvt) Ltd (2008 PTD 169). In response to a Court query, as to whether non-hearing of petitioner Mian Muhammad Nawaz Sharif either by the High Court or by this Court could be classified as an error apparent in the face of record to warrant interference, he in all fairness, submitted that so far as the case of Mian Shehbaz Sharif is concerned, this can be a ground but the case of Mian Muhammad Nawaz Sharif is distinguishable as he was issued notices several times but he opted not to appear, therefore non-hearing may not in his case constitute a valid ground to review the judgment.

10. Elaborating his submissions with regard to non-hearing so far as Mian Muhammad Shahbaz Sharif is concerned (in Civil Review Petitions No. 61 & 62 of 2009), the learned Attorney General submitted that the procedural aspect of grant of leave and the course to be followed thereafter by this Court is spelt out in the Supreme Court Rules. He referred to Order XIII Rule 6 where after the grant of leave, the court is mandated to issue directions as it may deem fit, *"for the provision of security by the petitioner for the costs of the respondents as may be awarded by the Court on the disposal of the appeal as well as for printing charges."* Similarly, Order XIV Rule 2 stipulates that after the grant of leave, "*the Registrar shall notify the respondents of the order of this Court granting leave to appeal*". Rules 3 of the said Order requires that the Registrar shall thereafter send for the original record of the High Court. Rule 11 of the same Order stipulates that, "*the provisions contained in these Rules shall not be applicable where a petition on grant of leave to appeal has been converted into an appeal by the Court and disposed of accordingly.*" Order XVI Rule 1 enjoins the respondent to enter appearance within 30 days of receipt of notice from the Registrar and it is only when the respondent fails to enter appearance in an appeal within 30 days of service upon him of the notice issued by the Registrar under Rule 10 of Order XIV of the Rules, the appeal may be said down ex-parte as against the said non-

appearing respondent. The perusal of the order sheet, the learned Attorney General contended, reflects that the afore-referred procedure was not followed by this Court without the mandatory provisions of notice of 30 days converted the petition into appeal and decided the same day. This he further added with respect, has resulted into miscarriage of justice and petitioner Mian Muhammad Shahbaz Sharif has been condemned unheard.

11. Addressing the Court on the powers of the President to "Pardon" a person in terms of Article 45 of the Constitution, the learned Attorney General submitted that the expression "Pardon" used in the said Article is disjunctive and is not controlled by later expressions i.e. "*reprieve and respite, and to remit, suspend or commute any sentence*". He added that the power of the Head of State to grant 'pardon' is universal, it is provided almost in every constitution and the construction accorded to the effect of 'pardon' in United States, United Kingdom and France would not be dissimilar to the one given to the President's power under Article 45 of the Constitution. He added that 'Pardon' once granted exonerates the offender of conviction and its consequences. He lastly submitted that notwithstanding the mandate of the constitutional provision with regard to the presidential power of 'pardon', the Court should have in mind the principle of trichotomy of power between the three branches of the State i.e. Legislature, Executive and Judiciary.

12. Mr. Shahid Orakzai who is an applicant in C.M. Nos. 1130 and 1551 of 2009 submitted that he fully supports the impugned judgment and prayed that the review petitions be dismissed.

Civil Review Petitions No. 61 & 62 of 2009 filed by Mian Muhammad Shahbaz Sharif.

13. Petitioner Mian Muhammad Shahbaz Sharif filed his nomination papers to contest the elections for the seat of Provincial Assembly Punjab in Constituency PP 48 Bhakkar-II. Only one person namely Malik Nazar Abbas filed an objection petition on the ground that he had defamed the judiciary by criticizing the then District & Sessions Judge, Lahore and alleging that he had got his nomination

papers rejected in the General Elections on 01.12.2007; that he along with his nomination papers had filed a false declaration required under section 12(2)(a) of the Act and that he was disqualified in terms of Article 63 (1) (g) of the Constitution read with section 99 of the Act. This objection was dismissed and nomination papers were accepted on 16.05.2008. The said objector did not challenge this order. Instead one Ikhlaq Ahmad Guddu filed an appeal against the acceptance before the Appellate Tribunal constituted by the Election Commissioner. But the latter opted to withdraw the appeal on 27.05.2008 and the same day Syed Khurum Shah filed a petition under section 14(5-A) of the Act purporting to lay information against Mian Muhammad Shahbaz Sharif to the effect that he was disqualified to be elected as member of the Assembly on the ground that he was allegedly guilty of defaming the judiciary; that he was propagating against the sitting Chief Justice and other Judges who had taken oath under the P.C.O., was attempting to divide the judiciary and was willful defaulter of, *"several loans running into billions."*. The learned Tribunal (comprising of Two Judges of the High Court) gave split judgment on 30.05.2008 i.e. one learned Judge dismissed the appeal and upheld the order of both the Returning Officers declaring petitioner Mian Muhammad Shahbaz Sharif and Mian Muhammad Nawaz Sharif to be qualified to contest elections, whereas the other learned Judge held that both were disqualified and rejected their nomination papers. The matter was referred to the Chief Election Commissioner and on 01.06.2008 he held that since the appeals had not been decided by the cut-off date given in the election schedule for disposal of appeals i.e. 31.05.2006, the same would deem to have been rejected . This was challenged in Writ Petition No. 6479 of 2008 which along with other Writ Petition No. 6468 of 2008 was allowed by a three member Bench of the High Court on the ground as follows:-

> *"In view of the above reasons, we hold that the learned Election Tribunal and the learned Chief Election Commissioner/Election Commission of Pakistan had fallen in error by treating the application of the petitioner as an appeal and to tag the same with another appeal subject matter of the impugned order. As a result of the above, the impugned orders of the Chief Election Commissioner/Election Commission of Pakistan dated 1.6.2008 and of the Tribunal dated 31.5.2008 are hereby*

set aside and are declared to be unlawful and without any lawful authority. The application of the petitioner shall be deemed to be pending. The learned Chief Election Commissioner is hereby required to constitute another Tribunal consisting of three Judges of the High Court to decide the application of the petitioner including his disqualification. Until then, respondent No.1 may continue to perform his functions as Chief Minister of the Punjab and Member of the Provincial Assembly."

14. Not satisfied with the judgment petitioner filed C.P. No. 905 of 2008 before this Court praying that since the order of the Chief Election Commissioner dated 01.06.2008 had been set aside by the High Court, the notification declaring petitioner to be member of the Provincial Assembly dated 3.6.2008 may also be set aside.

15. The learned counsel for the petitioner, Khawaja Haris Ahmed, ASC, seeking review of this Court's judgment made following submissions:-

(i) That petitioner was issued notice in C.P. No. 905 of 2008 at the leave granting stage and his non-appearance pursuant to the said notice could only have resulted in the grant of leave and not in its final disposal.

(ii) That a bare reading of C.P. No. 905 of 2008 would indicate that primarily it sought de-notification of the petitioner as a returned candidate from PP-148 Bhakkar-II; that no ground was agitated to declare him disqualified and that this Court in the judgment under review travelled beyond the ambit of the said petition without even hearing the petitioner which is an error on the face of record.

(iii) That the construction placed on section 14(6) and 14(5) of the Act is not tenable because (i) it is violative of legislative intent; (ii) of principle of harmonious construction of statutory provisions and (iii) of the golden rule of interpretation of statutes that any construction which leads to absurdity should be avoided. In support of the submissions made, the learned counsel relied on the judgments reported as

Commissioner of Income Tax, Peshawar v. Messrs Gul Collking Oil & Vegetable Ghee (Pvt) Ltd (2008 PTD 169), and Sui Northern Gas Company Ltd v. Engr. Naraindas and others (2001 SC 555). Learned counsel added that the legislative intent reflected in section 14(6) of the Act appears to be that the process of scrutiny should be over so that the candidates are left to go to their respective constituencies for purposes of public contact and campaign so that the election process proceeds further. A combined reading of section 11, 14(5), 14(5A) and 14(6) of the Act and Articles 224 and 225 of the Constitution indicates that the entire election process is time bound; each stage of election is given in the election schedule announced by the Chief Election Commissioner through notification issued under section 11, the nomination papers are to be filed by a date specified therein, the scrutiny is carried out within the dates given; and the appeals against acceptance are to be decided within the cut-off date given therein. The construction accorded by the learned High Court and by this Court in the judgment under review would disturb the said schedule and the election process is likely to be prolonged which is against the expressed mandate of the law and the constitution.

(iv) That the finding on question of default is based on a mis-assumption of the fact as also omission to take note of Article 63(i) and section 12(2)(c) of the Act.

(v) That the impugned finding that petitioner is disqualified since he did not disclose the pendency of criminal proceedings also suffers from an error on the face of record because it is purportedly based on a judgment of this Court reported at Shahid Orakzai v. Pakistan Muslim League (2000 SCMR 1969), a bare

perusal of which would show that inference drawn is factually incorrect.

(vi) That in observing that petitioner had been guilty of defaming judiciary, the learned Court did not appreciate that the criticism was not directed against judiciary as an institution but against a particular District & Sessions Judge. Similarly the inference drawn by the Court from clippings of certain newspapers is also not tenable because those statements are in a larger context i.e. petitioner had taken a public stand with regard to unconstitutional removal of judges and the mode of induction of new judges through oath provided under the Provisional Constitutional Order which stand stood vindicated by restoration of those judges and petitioner's non-appearance should be considered in the said moral perspective.

(vii) That in the General Elections petitioner's nomination papers were rejected by the Returning Officer on 01.12.2007. Petitioner challenged this through a petition addressed to the Chief Election Commissioner wherein he had given specific reasons for not challenging the said order before the judges during a phase when there was erosion of public trust in judiciary. But in the judgment under review, petitioner's principled stand has been held to be an acquiescence which is not tenable. Even otherwise, the afore-referred order cannot stand in the way of the petitioner to contest the bye-elections because: (a) the said order is not a court precedent to be followed but was merely an order of an executive functionary which enured only for the said election; (b) there was no column in the affidavit to be filed by a candidate at the time of filing of nomination papers requiring him to disclose that his nomination papers had been

rejected in some other constituency in earlier elections; and (c) the factual premise of the order dated 1.12.2007 disappeared before the filing of nomination papers in the by-elections which are subject matter of this petition as petitioner was acquitted in the criminal case.

(viii) That the finding in the judgment under review to the effect that petitioner is disqualified because he is defaulter of bank loan to the tune of Rs.2.48 billions is factually incorrect. A totally wrong inference has been drawn by the Court from a judgment of the Lahore High Court reported at Mian Muhammad Shahbaz Sharif v. Election Commission of Pakistan Islamabad (PLD 2003 Lahore 646). In the said case there was a settlement (dated 08.07.1998) between the consortium of banks and the two companies (M/s Ittifaq Foundries Pvt Ltd and M/s Ittifaq Brothers Pvt Limited) before the learned Company Judge in terms of which certain properties were surrendered for discharge of the liabilities in question and the banks having been satisfied thereafter did not file any fresh suit for recovery but the liability, he contended, was of the two companies and petitioner was in no way liable for the same to be hit by the disqualification provisions for the following reasons:-

(a) There was no loan in petitioner's name as stipulated in the mischief of Article 63 (1)(q).

(b) There is no material on record to hold that either of the afore-mentioned companies were mainly owned by the petitioner to be hit by section 12(2)(c) (read with explanation therein) of the Act.

(c) The said judgment is rather supportive of petitioner's case i.e. that he was not a defaulter. In this context, he read out Para-12

of the said judgment wherein petitioner's case was that he was not a defaulter and the operative part of the judgment which holds, *"as far as question of default is concerned, the contention of learned counsel for the petitioner Mian Shehbaz Sharif has merit."*

(ix) That the finding in Para-41 and 42 of the judgment under review to the effect that petitioner was guilty of contempt or any proceedings were pending against him or that since a member of petitioner's political party (who was a convict in a contempt case) was given an assignment by the petitioner would show that he is guilty of contempt, was rather arbitrary and no contempt proceedings were pending against him.

(x) That the learned High Court could not have allowed the constitutional petition of respondent Khuram Shah against the acceptance of petitioner's nomination papers and directed that the appeal to be pending because it had rightly been held to have been rejected by the operation of law by the order of the Chief Election Commissioner (dated 01.06.2008). After that an election dispute could only be challenged by way of an election petition as mandated by Article 225 of the Constitution read with section 52 and 76-A of the Act. The concurrent judgments on that score are violative of the law laid down by this Court in Election Commission of Pakistan through its Secretary v. Javaid Hashmi and others (PLD 1989 SC 396), Ghulam Mustafa Jatoi v. Additional District & Sessions Judge/Returning Officer, N.A. 158, Naushero Feroze and others (1994 SCMR 1299), Ch. M. Arif Hussain v. Rao Sikandar Iqbal (PLD 2008 SC 429). In the latter two judgments, this Court has provided a window for challenge to a

pre-election dispute only if either disqualification is floating on surface and no enquiry is called for or the factum of disqualification is reflected in some judgments or is evident from admitted facts. In the instant case, none of these jurisdictional facts were available for the learned High Court to assume jurisdiction.

(xi) That while accepting the constitutional petition of respondent Khuram Shah vide judgment dated 23.06.2008, the learned High Court had left the question of qualification or disqualification of petitioner to be decided by a 3-member Election Tribunal to be constituted by the Chief Election Commissioner. In the judgment under review, this Court travelled beyond the judgment of the High Court and the prayer made in C.P. No. 905 of 2008 by holding that petitioner is disqualified from being a member of the assembly. This, according to learned counsel, is an error apparent on the face of record to warrant review of the judgment under challenge.

16. The learned Deputy Attorney General submitted that the Federation of Pakistan had decided to challenge the judgment of the learned High Court in C.P. No. 878 of 2008 and of this Court in the instant review petition because firstly it was of the view that the Federation is the custodian of the fundamental rights granted to the citizens under the Constitution of Pakistan; secondly the review petitioner Mian Muhammad Shahbaz Sharif is member of a party which is coalition partner with party forming the Federal Government; thirdly it would like democracy to take roots; fourthly the question of scope of Article 45 of the Constitution relating to the presidential power of pardon was involved. However, since the order of pardon has not been placed on record, he is not in a position to say much about its terms and as the petitioner himself has filed a review petition, the petitioner's burden has been lessened.

17. The learned counsel for the respondent, Mr. Ahmad Raza Qasuri, Sr. ASC made the following submissions:-

(i) That this Court in exercise of review jurisdiction under Article 188 read with Order XLVII Rule 1 of the C.P.C. has limited jurisdiction and cannot either rehear the matter or treat it as an appeal.

(ii) That notice given to petitioners Mian Muhammad Nawaz Sharif and Mian Muhammad Shahbaz Sharif by this Court at the initial stage was sufficient and even the same was repeated through the Advocate General Punjab. It is an established practice of this Court that when a petition is argued at length it can be converted into appeal and allowed. Reliance was placed on the case reported at Rana Muhammad Hayat Khan v. Rana Imtiaz Ahmad Khan (PLD 2008 SC 85).

(iii) That the right of review cannot be extended to a party who refused to appear thrice i.e. before the Appellate Election Tribunal, the High Court and before this Court when civil petitions for leave to appeal were argued.

(iv) That the non-appearance of the petitioners before the learned High Court and this Court was deliberate as they had made public statements published in newspapers wherein they had categorically taken a stand that they would not appear in the Courts established under the Provisional Constitutional Order (P.C.O.).

(v) That respondent-petitioner Khurrum Shah had filed a writ of quo-warranto against Mian Muhammad Shahbaz Sharif as his election as a returned candidate had been notified by the Election Commission vide notification dated 3.6.2008. Reliance was placed by learned counsel on Ghulam Rasool v. Muhammad Hayat (PLD 1984 SC 385),

Election Commission of Pakistan through its Secretary v. Javaid Hashmi and others (PLD 1989 SC 396).

(vi) That a pre-election dispute emanating from inherent disqualification of a candidate which is floating on record and does not require deeper probe can be subject matter of writ petition under Article 199 of the Constitution and the concurrent judgments on that score are unexceptionable. Reliance was placed on Lt. Col. Farzand Ali v. Province of West Pakistan through the Secretary Department of Agriculture Government of West Pakistan (PLD 1970 SC 98), Muhammad Anwar v. Muhammad Akbar (PLD 2000 SC 52), Lt. General (R) Salahuddin Tirmizi v. election Commission of Pakistan (PLD 2008 SC 735), Ghulam Mustafa Jatoi v. Additional District & Sessions Judge/Returning Officer, N.A. 158, Naushero Feroze and others (1994 SCMR 1299).

(vii) That on the basis of material placed before the learned High Court and this Court, petitioner Mian Muhammad Shahbaz Sharif has rightly been disqualified to contest the elections as he is a bank defaulter to the tune of Rs.2.48 billion, he is guilty of defaming the judiciary and he had submitted a false affidavit at the time of filing of nomination papers that he is qualified to contest the elections.

(viii) That the appeal filed by Noor Elahi against petitioner Mian Muhammad Nawaz Sharif and the application filed under subsection (5-A) of section 14 of the Act against Mian Muhammad Shahbaz Sharif remained undecided on account of split opinions. A reference was made to the Chief Election Commissioner for constitution of a fresh bench. The latter should have allowed the request as he had power under section 11-A of the Act to alter the schedule. Since this was

not done, petitioner was left with no remedy but to file a constitution petition.

(ix) That the judgment of the learned High Court directing the Chief Election Commissioner to constitute an Appellate Tribunal comprising of three Judges of the High Court with the observation that the application under sub-section (5-A) of section 14 of the Act shall be deemed to be pending was unexceptionable: first because the source report/application under sub section (5-A) is unlike sub-section (5) of the same section is not time bound and could not deemed to have been rejected in terms of sub-section (6) of the said section and secondly the Chief Election Commissioner could alter the schedule under exceptional circumstances as in the instant case under section 11-A of the said Act.

(x) That Article 225 of the Constitution is not a complete bar to invoke writ jurisdiction of the High Court under Article 199 of the Constitution provided the facts are not disputed. However, he conceded if the facts are disputed, election petition is the proper remedy.

Civil Review Petition No. 50 of 2009 filed by Speaker Punjab Assembly.

18. M/s Muhammad Raza Farooq, ASC and Ashtar Ausaf Ali, ASC, learned counsel for the petitioner submitted that the petitioner being Speaker of the Provincial Assembly was a necessary party as he has to see and ensure that the House is properly constituted; that it functions smoothly and to protect the interests of the Province. However, the Court in the judgment under review has not adverted to this aspect and therefore it warrants review.

Crl. Review Petition No. 22 of 2009 filed by Javed Mehmood.

19. The learned counsel for the petitioner seeks review of this Court's order passed in Crl. Original No. 41 of 2008 by submitting that

petitioner had moved C.P. No. 657 of 2008 for bona fide reasons as he was the Chief Secretary of the Province and wanted to assist the Court on any factual aspect of the matter; that he had no personal interest; that he has an unblemished service record. The observations made in Crl. Original Petition No. 41 of 2008 are therefore uncalled for and need to be reversed.

20. On 26.5.2009, we had disposed of theses petitions in terms of a short order, operative part of which is as follows:-

(i) *"That the judgments under review i.e. of the Lahore High Court dated 23.06.2008 and of this Court dated 25.02.2009 are ex-parte on account of which certain factual aspect and legal provisions having bearing on the issues raised, were not brought to the notice of the Court and therefore were not considered leading to miscarriage of justice which has been found by us to be errors apparent on the face of record warranting review.*

(ii) *Realizing the exceptional and extraordinary events relating to unconstitutional removal of Judges of the Superior Courts which in the judgment under review has been described as, ""enforced by a brutal force, by deviating from constitutional provisions," triggering an unprecedented nationwide movement, culminating in the restoration of those Judges, and during the interregnum, non-appearance of petitioners before the Courts then constituted could neither be termed as contumacious nor reflecting acquiescence, the findings of fact rendered on such assumptions merit to be interfered with in the review jurisdiction.*

(iii) *That both the appeals filed under section 14(5) of the Act and the information laid or directed against the acceptance of nomination papers (under section 14(5A) of the said Act) were mandated to be decided by or before 31st of May 2008, the period fixed for deciding the appeals in the Schedule issued by the Chief*

Election Commissioner under section 11 read with section 14(5) of the said Act. Since the appeals were not decided by then, the order of the Chief Election Commissioner holding that the appeal stood dismissed was in accord with section 14(6) of the Act which stipulated that, "an appeal not disposed of within the period specified in sub section (5) shall be deemed to have been dismissed." The finding that information laid under section 14(5A) of the said Act could remain pending and decided beyond the said date fixed for disposal of appeals was not in consonance with the legislative intent.

(iv) The last date for disposal of appeal against the acceptance of nomination papers was 31.05.2008 and thereafter the Appellate Tribunal had become functus officio. The order of the Chief Election Commissioner dated 01.06.2008 to the effect that since the appeals had not been decided within the afore-referred cut-off date, the same were deemed to have been rejected (in terms of sub-section (6) of section 14 of the said Act) was passed with jurisdiction. The learned High Court not only allowed respondents' writ petitions against this order but while doing so, passed two inconsistent judgments of even date i.e. while in the case of Mian Muhammad Shahbaz Sharif, it held that the source information/petition (under sub-section (5A) of section 14 of the Act) shall be deemed to be pending before the Appellate Tribunal comprising of three Judges of the High Court to be constituted by the Chief Election Commissioner, whereas in the case of Mian Muhammad Nawaz Sharif declared him disqualified to contest the elections.

(v) The mandate of Article 225 of the Constitution has not been appreciated in the context of the instant cases. This Article places a bar to challenge an election

dispute except through an election petition under the law i.e. the Representation of Peoples Act, 1976. In exceptional circumstances, however, the qualification or disqualification of a candidate can be challenged under Article 199 of the Constitution provided the order passed during the election process is patently illegal, the law has not provided any remedy either before or after the election; and the alleged disqualification is floating on record requiring no probe and enquiry. In the cases in hand, the issues of unpaid loans, of court contempt and of filing false affidavit were disputed questions of fact which could not have been adjudicated upon in the proceedings under Article 199 of the Constitution and even the material placed before the Court was not sufficient to render the impugned findings.

(vi) *That the 'Presidential Pardon', in the case of Mian Muhammad Nawaz Sharif stood admitted by the Federation of Pakistan through the statement made by the Deputy Attorney General before the High Court, before this Court during the hearing of the main petition and in the instant review petition and even by the learned Attorney General for Pakistan who appeared in these review proceedings. To allege that it was conditional or qualified pardon required deeper probe which exercise entailed factual enquiry. Similarly, the questions whether petitioners were hit by Article 63(h) and (l) of the Constitution or by section 99 of the Act could also not have been decided by the High Court or by this Court in writ jurisdiction. The judgments under review therefore are not in accord with the law laid down by this Court in the cases reported as Election Commission of Pakistan through its Secretary v. Javaid Hashmi and others (PLD 1989 SC 396), Ghulam Mustafa Jatoi v. Addl. District &*

Sessions Judge/Returning Officer N.A. 158, Naushero Feroze and others (1994 SCMR 1299) and Let. Gen. (R) Salahuddin Tirmizi v. Election Commission of Pakistan (PLD 2008 SC 735 at 763).

(vii) *That one of the onerous functions of the Supreme Court is to protect the constitution and to sustain democracy. Democracy is not merely holding of periodical elections or of governance by legislative majority. It is a multi-dimensional politico-moral concept epitomizing the abiding values of equality, human dignity, tolerance, enjoyment of fundamental rights and due process of law. Whether it is the issue of denial of a substantive right or of construing a statutory provision, these principles should weigh with the Court. Article 4 of the Constitution is a restraint on the legislative, executive and judicial organs of the State to abide by the rule of law. Abdication of this awesome responsibility by any organ leads to arbitrariness and injustice. These in our estimation are canons of substantive democracy embodied in our Constitution which, inter alia, we have kept in view while exercising the power of judicial review."*

21. The detailed reasoning is as under.

22. Having heard learned counsel for the parties as also learned Attorney General for Pakistan, the issues which crop up for consideration broadly are as under:-

(i) Whether petitioner's non-appearance could be condoned for the reasons given by him and whether the impugned findings without hearing him have led to a miscarriage of justice amounting to an error on the face of record to warrant exercise of review jurisdiction?

(ii) Whether the proceedings initiated pursuant to a source information (against acceptance of nomination papers) under section 14(5-A) of the Act could go beyond the period

specified in sub-section 5 and the election schedule announced by the Chief Election Commissioner under section 11 of Act read with Article 225 of the Constitution and whether the construction accorded to the afore-referred provisions in the judgment under review is not against the mandate of section 14(6) of the Act which stipulates that, *" An appeal not disposed of within the period specified in sub-section (5) shall be deemed to have been rejected."*?

(iii) Whether after the order of the Chief Election Commissioner declaring the appeal as deemed to have been rejected in terms of section 14(6) of the Act, were the respondents (Noor Elahi (candidate) and Khuram Shah (informer objector) left with no alternate remedies in terms of section 52 and 76-A of the Act to have invoked writ jurisdiction under Article 199 of the Constitution and whether the non-consideration of the import of section 76-A of the Act is not an error apparent on the face of record?

(iv) Whether in the facts and circumstances of this case could an election dispute be raised and order passed with jurisdiction (dated 01.06.2008) be reversed by invoking Article 199 of the Constitution and whether the judgment under review is violative of the law laid down by this Court in Election Commission of Pakistan through its Secretary v. Javaid Hashmi and others (PLD 1989 SC 396), Ghulam Mustafa Jatoi v. Addl. District & Sessions Judge/Returning Officer, N.A. 158, Naushero Feroze and others (1994 SCMR 1299), Ayatullah Dr. Imran Liaquat Hussain v. Election Commission of Pakistan Islamabad and another (PLD 2005 SC 52) and Aftab Shahban Mirani v. President of Pakistan and others (1998 SCMR 1863)?

(v) Whether the judgments under review are violative of the fundamental rights provision of the Constitution and if so whether this could constitute a valid ground to review the impugned judgments of this Court?

Issue No.(i) *Whether petitioner's non-appearance could be condoned for the reasons given by him and whether the findings given without hearing him have led to miscarriage of justice amounting to an error on the face of record to warrant exercise of review jurisdiction?*

23. The issue relates to the non-appearance of petitioners before the Lahore High Court and a Bench of this Court seized of the matter leading to the judgment under review. The case of the petitioners who happen to be real brothers is that as leaders of one of the main streams political parties i.e. Pakistan Muslim League (N), they had taken a public stand against the Imposition of "State of Emergency" on 3rd of November, 2007 by General Pervez Musharraf, the arbitrary and unconstitutional removal of judges of the superior courts and were party to a public and collective oath taken by all the candidates of their party in the General Elections held in February, 2008 that if elected, they would struggle for the restoration of superior judiciary and till then they had decided to abstain from appearing before the court then constituted. This stand it was contended was neither directed against the judiciary as an institution nor any particular judge was targeted but it was more an effort to save the Constitution and the institution of judiciary which is the third most important organ of the State.

24. While rendering the judgments under review, the Court did not have the benefit of hearing the petitioners on account of which their stance could not be appreciated. The petitioners in their letter to the Chief Election Commissioner and in their public statements had expressed great anguish over the imposition of the "State of Emergency", the unconstitutional removal of judges and induction of judges through the Provisional Constitutional Order. In all fairness, the Court which passed the judgment under review, shared this anguish on moral plane but opted a course which in their perception was in institutional interest. In Para-29 of the judgment (in case of Mian Muhammad Nawaz Sharif) while referring to the "Imposition of State of Emergency" on 3rd of November, 2007 and the issuance of Provisional Constitutional Order under which the judges were asked to take the oath, it was observed, "…….*The Judges who were offered and invited to take oath were in an enigma as to take or to refuse the oath. In case of*

refusal, the judicial institution was to suffer greatest harm and its fabric which was woven in a period of more than 150 years, was to collapse completely. In the event of refusal to take the oath, it was expected that this judicial institution might be occupied by such persons who had no knowledge and expertise of delivering justice. There were many other considerations also in their mind. To save the judicial institution, to create hindrance and to prevent the spreading of chaos in the country, for the better interest of this institution and for the whole betterment of the citizens of Pakistan, it was decided that the offer of oath might not be declined."

25. Notwithstanding the sharing of moral perception, the Court repelled the reasons for non-appearance on the ground that the petitioners were by implication attributing personal bias to the judges. It was observed that Judges *"are assessors of their own conscience, as they knew that they are answerable to the Allah Almighty. Why they should feel bias in favour of any one? When they are not involved in any referred to incident, which has already become a past and closed transaction. There are no reasons and grounds to possess the bias against petitioners and their candidate."* However, on a deeper appreciation of the stance taken and after hearing their learned counsel, it has been found by us that petitioners' non-appearance was not attributable to a personal bias against the Court then constituted but on account of a public stand that they had taken before entering the process of elections i.e. the collective oath which they and all the party candidates had taken on the issues relating to the Imposition of "State of Emergency" on 3rd of November, 2007 and a resolve to launch a movement for the restoration of superior judiciary. The restoration of the Hon'ble Chief Justice of Pakistan and other judges who were deposed on the imposition of "State of Emergency" and the immediate appearance of the petitioners by way of filing these review petitions indicate that the stance taken was based on a certain moral grounds which stood vindicated. The same cannot be dubbed as either contumacious or reflective of acquiescence to warrant the impugned findings.

26. There is yet another aspect of the matter. Notice was issued to the petitioner Mian Muhammad Shahbaz Sharif (in Civil Petition No. 905 of 2008) filed by Khuram Shah but the review petitioner did not appear. The Court heard the respondent-petitioner and others at some length and after conclusion of arguments, the same day on 25.2.2009 converted the civil petition into appeal and allowed it which, as was candidly argued by learned Attorney General, is not in consonance with Order XIII Rule 6, Order XIV Rule 2 and Order XVI Rule I of the Supreme Court Rules which mandate as under:-

> *"**Order XIII Rule 6**. Where the Court grants leave to appeal it shall, in its order, give such directions, as it may deem fit, for the provision or security by the petitioner for the costs of the respondents as may be awarded by the Court on the disposal of the appeal as well as for printing charges. These directions, as far as they relate to security for costs, shall be subject to modifications at the instance of any party, at any time prior to the hearing of the appeal.*
> ***Order XIV Rule2.** Where an appeal has been admitted by an order of this Court, the Registrar shall notify the respondents of the order of this Court granting leave to appeal, and shall also transmit a certified copy of the order to the Registrar of the High Court concerned.*
> ***Order XVI Rule 1.** The respondent shall enter an appearance within 30 days of the receipt of notice from the Registrar regarding grant of leave to appeal to the appellant, under Rule 2, Order XIV, but he may enter an appearance at any time before the hearing of the appeal on such terms as the Court may deem fit."*

27. We agree with learned Attorney General for Pakistan that after the grant of leave, Order XVI Rule1 provides 30 days time for the respondent to appear. In the instant cases, however, instead of waiting for 30 days to enable the petitioner/respondent to appeal, the Court allowed the appeal immediately when the petition was converted into appeal.

28. No one should be condemned unheard is an old adage ever since the advent of judicial dispensation. In Commissioner of Income Tax, East Pakistan v. Syeedur Rehman (PLD 1964 SC 410), this Court went to the extent of classifying an order passed without hearing as a

void order. In the afore-referred circumstances, we are of the view that non-hearing of petitioners is an error on the face of record meriting interference in review jurisdiction.

Issue No.(ii) *Whether the proceedings initiated pursuant to a source information (against acceptance of nomination papers) under section 14(5-A) of the Act could go beyond the period specified in sub-section 5 of the said provision and the election schedule announced by the Chief Election Commissioner under section 11 of Act read with Article 225 of the Constitution and whether the construction accorded to the afore-referred provisions in the judgment under review is not against the mandate of section 14(6) of the Act which stipulates that, " An appeal not disposed of within the period specified in sub-section (5) shall be deemed to have been rejected."?*

29. To appreciate this issue, it would be in order to refer to some of the relevant provisions of the Representation of Peoples Act, 1976 which are as follows:-

> "***11. Notification for election.----[(1)*** *As soon as [may be necessary and practicable] the President makes an announcement of the date or dates on which the polls shall be taken, the Election Commissioner [not later than thirty days of such announcement] shall, by notification in the official Gazette, call upon a constituency to elect a representative or representatives and appoint*----
>
> ***(a)*** *the last date for making nomination, which shall be the sixth day after the date of publication of the notification or, if that day is a public holiday, the next succeeding day which is not public holiday;*
>
> ***[(b)*** *the dates for the scrutiny of nominations, which shall be the [seven] days immediately following the last date for making nominations or, if that day is a public holiday, the next succeeding day which is not a public holiday.]*

(c) *[Omitted vide Act No. IX of 1991, dt. 18.6.1991]*

(d) *the last date for filing of appeals against acceptance or rejection of nominations, which shall be the [fourth] day following the [last] date for the scrutiny of nominations or, if that day is a public holiday, the next succeeding day which is not a public holiday;*

(e) *the last date for decision of appeals, which shall be the [seventh] day following the last date for filing of appeals or, if that day is a public holiday, the next succeeding day which is not a public holiday;*

(ee) *the last date for the withdrawal of candidature, which shall be the day following the last date for decision of appeals or, if that day is a public holiday, the next succeeding day which is not a public holiday;]*

(f) *the last date for publication of the revised list of candidates, which shall be the second day following the last date for decision of appeals; and*

(g) *the date or dates on which a poll shall, if necessary be taken, which or the first of which shall be a date nor earlier than the twenty-second day after the publication of the revised list of candidates.* (Emphasis is supplied)

(3) *A Returning Officer shall, as soon as may be after the publication of a notification under sub-section (1), give public notice of the dates specified by the Commission in respect of the constituency or constituencies of which he is the Returning Officer; and the public notice shall be published at some prominent place or places within the constituency to which it relates.*

> ***(4)*** *A Returning Officer shall, by the public notice given under sub-section (3) invite nominations specifying the time by which and the place at which nomination papers shall be received by him.*
>
> ***[11A. Alteration in election programme.----*** *Notwithstanding anything contained in section 11, the Commission may at any time after the issue of a notification under sub-section (1) of that section, make such alterations in the programme announced in that notification for the different stages of the election as may, in its opinion, be necessary.]*

30. The scrutiny is carried out in accord with the Election Schedule issued by the Chief Election Commissioner under section 11 of the Act. Appeals against the orders passed by the Returning Officers are heard by the Appellate Election Tribunals under section 14 of the Act. The Appellate Tribunals are mandated to decide the appeals within the time given in the said schedule. Some of the important provisions of the said section are as follows:-

> *"**14. Scrutiny.-----(1)** The candidates, their election agents, [the proposers and seconders and one other person authorized in this behalf by each candidate] [and an elector who has filed an objection to the nomination of a candidate,] may attend the scrutiny of nomination papers, and the Returning Officer shall give them reasonable opportunity for examining all nomination papers delivered to him under section 12:*
>
> *[Provided that an elector who has filed an objection to the nomination of a candidate shall only attend the scrutiny of the nomination paper of that candidate.]*
>
> ***(2)*** - - - - - - -
>
> ***(3)*** - - - - - - -
>
> ***(4)*** - - - - - - - -
>
> ***[(5)*** *A candidate, may prefer an appeal against the decision of the Returning Officer rejecting or, as the*

case may be, accepting the nomination paper of the candidate to the Tribunal constituted for the constituency to which the nomination relates and consisting of not less than two nor more than three Judges of the High Court nominated by the Commissioner, with the approval of the President; and such appeal shall be summarily decided within such time as may be notified by the Commission and any order passed thereon shall be final.]

(5A) *If, on the basis of any information or material brought to its knowledge by any source, a Tribunal constituted under sub-section (5) is of the opinion that a candidate whose nomination papers have been accepted is a defaulter of loan, taxes government dues or utility charges or has had any loan written off or suffers from any other disqualification from being elected as a member of an Assembly, it may, on its own motion, call upon such candidate to show cause why his nomination papers may not be rejected, and if the Tribunal is satisfied that the candidate is actually a defaulter as aforesaid or has had a loan written off or suffers from any disqualification, it may reject the nomination papers.]* ***Note:*** *inserted vide Ordinance No. XXXVI of 2002, dated 31.07.2002.*

(6) *An appeal not disposed of within the period specified in sub=section (5) shall be deemed to have been rejected."*

31. The election Commission of Pakistan in exercise of the powers contained in section 11 of the Act issued the Election Schedule on 07.05.2008, a break-up of various stages of scrutiny given therein is as follows:-

Sr. No.	***Description***	***Date***
(i)	*Date of filing of nomination papers.*	*8.5.2008 to 13.5.2008*

(ii)	*Scrutiny by Returning Officer*	*14.5.2008 to 20.5.2008*
(iii)	*Last date for appeals against rejection/acceptance of nomination papers.*	*24.5.2008*
(iv)	*Last date for decision on appeal*	*31.5.2008*
(v)	*Last date for withdrawal of candidature.*	*2.6.2008*
(vi)	*Publication of revised list.*	*2.6.2008*
(vii)	*Polling day*	*26.6.2008*

32. A chart of the objections and appeal or applications/source information under sub-section 5-A of section 14 of the Act filed against the nomination papers of petitioners Mian Muhammad Nawaz Sharif and Mian Muhammad Shahbaz Sharif and the disposal of those objections as also the appeals filed is as under:-

Name of Candidate	***Rival Candidate***	***Objection filed before Returning Officer by***	***Remarks***	***Appeal u/sub section (5)/Application/Source Information under sub section (5-A) of the Act and decision***
Mian Muhammad Nawaz Sharif	*(i) Noor Elahi* *(ii) Mian Akhlaq Ahmed Guddu*	*Mian Akhlaq Ahmad Guddu*	*Nomination papers accepted on 15.5.2008*	*(i) Appeal filed by Akhlaq Ahmad @ Guddu on 24.5.2008 which was withdrawn.* *(ii) Appeal filed by Noor Elahi u/s 14(5) of the Act before Appellate Tribunal.* *(iii) Application/source information filed under sub-section (5-A) of the Act by Khuram Shah.* *Decision of Appellate Tribunal on 30.5.2008.*
Mian Muhammad Shahbaz Sharif	---	*Malik Nazar Abbas.*	*Nomination papers accepted on 16.05.2008*	*Khuram Shah filed petition u/s 14(5A), split decision of the Election Appellate Tribunal on 30.5.2008.*

33. The legislative intent with regard to disposal of appeals against orders of Returning Officers can be appreciated by a combined reading of sub-sections (5) and (6) of section 14 of the Act. While the former provision mandates that the appeals against acceptance of nomination papers, *"shall be summarily decided within such time as*

may be notified by the Commission and any order passed thereon, shall be final." The latter provision (sub-section 6) provides, *"an appeal not disposed of within the period specified in sub-section (5) shall be deemed to have been rejected."* This sub-section by inserting a deeming clause creates a legal fiction. Whenever such an expression is used in a Statute, it shall have to be treated as something stipulated in the said provision, though in reality it may not be. It is by now a well settled principle of construction that in interpreting a provision creating a legal fiction the court has to ascertain for what purpose the fiction is created, whereafter the court is to assume all those facts and consequences which are intended.

34. In Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd and others (AIR 2003 SC 511), the Court was called upon to interpret section 20(2) of the Gujarat Town Planning & Urban Development Act (Presi. Act 27 of 1976), which contained a deeming provision stipulating lapse of proceedings of acquisition in the manner as under:-

> *"(2) If the land referred to in sub-section (1) is not acquired by agreement within a period of ten years from the date of the coming into force of the final development plan or if proceedings under the Land Acquisition Act, 1894, are not commenced within such period, the owner or any person interested in the land may serve a notice on the authority concerned requiring it to acquire the land and if within six months from the date of service of such notice the land is not acquired or no steps are commenced for its acquisition, the designation of land as aforesaid shall be deemed to have lapsed."*

35. Since the acquisition did not commence by the cut-off date, the Court, by giving effect to the legal fiction held as follows:-

> *"Sub-section (2) of S.20, however, carves out an exception to the exercise of powers by the State as regards acquisition of the land for the purpose of carrying out the development of the area in the manner provided for therein; a bare reading whereof leaves no manner of doubt that in the event the land referred to under sub-section (1) of S.20 thereof is not acquired or proceedings under the Land Acquisition Act are not commenced and further in the event an owner or a person interested in the land serves a notice in the manner specified therein, certain consequences ensue, namely, the designation of the land shall be deemed to have lapsed. A legal fiction, therefore, has been created in the said provision."*

36. In the cases in hand, the legislative intent was to complete the scrutiny process of nomination papers including the disposal of appeals by a certain date for which the Election Commission had issued a Schedule (Para-31 above). In the said Schedule, each stage of scrutiny was time bound and for the purpose of these cases, it was the appellate stage. Admittedly the appeals had not been decided by the said cut-off date and the Chief Election Commissioner vide order dated 01.06.2008 by giving effect to the said legal fiction embodied in sub-section (6), referred to above, held the appeals to have been rejected.

37. The order dated 01.06.2008 of the Chief Election Commissioner was challenged by Noor Elahi (in W.P. No. 6468 of 2008) and by Syed Khuram Shah (in Writ Petition No. 6469 of 2008) qua Mian Muhammad Nawaz Sharif whereas in the case of Mian Muhammad Shahbaz Sharif, it was challenged by Syed Khuram Shah alone (in W.P. No. 6470 of 2008) The learned High Court vide judgment dated 23.06.2008 allowed all the three writ petitions and it declared Mian Muhammad Nawaz Sharif to be disqualified on account of conviction in a NAB reference case, the loans default and for de-faming the judiciary. However, the same Bench vide the judgment of even date in the case of Mian Muhammad Shahbaz Sharif, held that the Appellate Tribunal had wrongly tagged source information filed by Syed Khuram Shah with the appeal and it could not be deemed to have been rejected. In learned High Court's view, a source information/application under sub-section 5-A of section 14 of the Act unlike appeal under sub-section 5 of the said section was not time bound and it could be decided beyond the last date fixed for appeal in the schedule i.e. 31.5.2008. This inconsistent judgment, we may observe with respect, is violative of legislative intent and is reflective of misconception of law and fact both for following reasons:-

(i) One of the candidates namely Noor Elahi (Writ Petition No. 6468 of 2008) had filed a time barred appeal against Nawaz Sharif on 28.05.2008 whereas the last date was 24.05.2008. On 26.5.2008, Khuram Shah (petitioner in W.P. Nos. 6469 and 6470 of 2008) through his counsel Mr. Mohayyuddin Qazi filed an

application against both the petitioners, which on the title page was described as a source report under sub-section (5-A) of section 14 of the Act. It was on the face of it a ploy to circumvent the provision relating to limitation. Not only the counsel was the same in appeal and the application/source information but even the grounds agitated were similar. The object was that if appeal was dismissed as time barred, the same purpose could be achieved through the application describing it as a source report under sub-section (5-A) of section 14 of the Act. It was an attempt to defeat the legislative intent.

(ii) An appeal filed under sub-section 5 of section 14 of the Act is to be decided by the last date fixed for the said purpose in the election schedule announced by the Election Commission of Pakistan under section 11 of the Act and the period fixed in the schedule cannot go beyond the said date because the same is mandated by section 11 (1)(e) of the Act which provides as under:-

> ***11(1)(e)*** *the last date for decision of appeals, which shall be the [seventh] day following the last date for filing of appeals or, if that day is a public holiday, the next succeeding day which is not a public holiday;*

(iii) If the overall scheme of the provisions relating to scrutiny of nomination papers is kept in view, sub-section (5-A) of section 14 is an enabling provision i.e. enabling the same Appellate Tribunal (constituted under sub-section (5) above) to enquire into the eligibility of a candidate on information given by a person other than a candidate (who can file appeal under sub-section 5). And decision on this source report is to be given by or before the same date fixed for disposal of appeals. If appeal or source information are not decided within the period so fixed, sub-section (6) of section 14 of the Act comes into play and the appeal is deemed to have been

dismissed. Apparently, sub-section (5-A) unlike sub-section (5) is not time bound, but this provision is *ejusdem generis* with sub-section (5) (of section 14 of the Act) and the decision on a source information has to be made within the period prescribed for deciding the appeals in terms of sub-section (5). Otherwise, it would defeat the legislative intent expressed in sub-section (5) and (6) of section 14 of the Act and would disturb the election schedule.

(iv) The contention that enquiry on a source report (under sub-section (5-A) of the said section) can go beyond the period for disposal of appeal would lead to anomalous results. An appeal/objection filed under sub-section (5) against the same candidate would be disposed of by the cut-off date given in the schedule, whereas a source information against the same candidate would spill over the said date. Moreover, it would make sub clause (e) of section 11(1) redundant which stipulates that the last date for decision of such appeals shall be, *"the seventh day following the last date for filing appeals."* The candidates would remain bogged down in court cases instead of attending to their election campaign.

(v) The argument that the petition filed and enquiry initiated under sub-section (5-A) of section 14 of the Act is not time bound may lead to yet another anomalous consequence i.e. the Appellate Election Tribunal having dismissed an appeal under sub-section (5) against acceptance of nomination papers may still entertain a source information against the same candidate under sub-section (5-A) and review its earlier order. This would militate the legislative intent. It is a settled principle of law that power of review is specifically conferred by a Statute and cannot be assumed.

Issue No.(iii) *Whether after the order of the Chief Election Commissioner declaring the appeal as deemed to have been rejected in terms of section 14(6) of the Act, were the respondents (Noor Elahi (candidate) and Khuram Shah (informer objector) left with no alternate remedies in terms of section 52 and 76-A of the Act to have invoked writ jurisdiction under Article 199 of the Constitution and whether the non-consideration of the import of the latter provision is not an error apparent on the face of record?*

Issue No.(iv) *Whether in the facts and circumstances of this case could an election dispute be raised and order passed with jurisdiction (dated 01.06.2008) be challenged by invoking Article 199 of the Constitution and whether the judgment under review is violative of the law laid down by this Court in Election Commission of Pakistan through its Secretary v. Javaid Hashmi and others (PLD 1989 SC 396), Ghulam Mustafa Jatoi v. Addl. District & Sessions Judge/Returning Officer, N.A. 158, Naushero Feroze and others (1994 SCMR 1299), Ayatullah Dr. Imran Liaquat Hussain v. Election Commission of Pakistan Islamabad and another (PLD 2005 SC 52) and Aftab Shahban Mirani v. President of Pakistan and others (1998 SCMR 1863)?*

38. Both these issues are interlinked and therefore are being dealt with jointly. Since in the preceding paragraphs, we have held that the appeal under sub-section (5) of section 14 and an objection through source information against the acceptance of nomination papers under sub-section (5-A) of the said section are to be decided within the period fixed for deciding appeals in the Schedule (last date 31.05.2008), the order of the Chief Election Commissioner holding that as those appeals had not been decided by the afore-mentioned cut-off date, the same shall be deemed to have been rejected is unexceptionable. This was passed with jurisdiction and could not have been interfered with under Article 199 of the Constitution. After the order of the Chief Election Commissioner, an election dispute ordinarily could only be raised through an election petition and before an Election Tribunal constituted for the said purpose. The legislative intent in this context is unequivocal. Article 225 of the Constitution mandates as follows:-

> *"**225.** No election to a House or a Provincial Assembly shall be called in question except by an election petition*

presented to such tribunal and in such manner as may be determined by Act of [Majlis-e-Shoora (Parliament).]"

39. In accord with the afore-referred constitutional mandate, the Representation of Peoples Act was enacted, section 52 of which provides as follows:-

> *"**52. Election petition.**—**(1)** No election shall be called in question except by an election petition made by a candidate for that election (hereafter in this Chapter referred to as the petitioner).*
> ***(2)** An election petition shall be presented to the Commissioner within [forty-five days] of the publication in the official gazette of the name of the returned candidate and shall be accompanied by a receipt showing that the petitioner has deposited at any branch of the National Bank of Pakistan or at a Government Treasury or sub-Treasury in favour of the Commissioner, under the prescribed head of account, as security for the costs of the petition, a sum of one thousand rupees."*

40. A combined reading of Article 225 of the Constitution and sections 2(xi), 52, 76-A of the Act would show that the election of a returned candidate under the afore-referred provisions can be challenged by a candidate alone. However, through a later amendment the law has provided an additional power to the Election Tribunal to proceed against such a candidate in terms of section 76-A of the said Act on its own motion or on the basis of material or information laid before it and on the grounds mentioned therein. The said section reads as follows:-

> *"[**76A. Additional powers of election Tribunal.**—
> **(1)** If an Election Tribunal, on the basis of any material coming to its knowledge from any source or information laid before it, is of the opinion that a returned candidate was a defaulter of loan, taxes, government dues or utility charges, or has submitted a false or incorrect declaration regarding payment of loans, taxes, government dues or utility charge, or has submitted a false or incorrect statement of assets and liabilities of his own, his spouse or his dependents under section*

12, it may, on its own motion or otherwise, call upon such candidate to show cause why his election should not be declared void and, if it is satisfied that such candidate is a defaulter or has submitted false or incorrect declaration or statement, as aforesaid, it may, without prejudice to any order that may be, or has been made on an election petition, or any other punishment, penalty or liability which such candidate may have incurred under this Act or under any other law for the time being in force, make an order----

(a) declaring the election of the returned candidate to be void; and

(b) declaring any other contesting candidate to have been duly elected.

***(2)** If on examining the material or information referred to in sub-section (1), an Election Tribunal finds that there appear reasonable grounds for believing that a returned candidate is a defaulter or has submitted a false or incorrect declaration referred to in sub-section (1) it may, pending decision of the motion under sub-section (1), direct that the result of the returned candidate shall not be published in the official Gazette.*

***(3)** No order under sub-section (1) or sub-section (2) shall be made unless the returned candidate is provided an opportunity of being heard.]*

41. The provisions of section 14(3), 14(5) and 14(5-A) of the Act relate to the scrutiny of nomination papers by the Returning Officers and the right of a rival candidate (under sub-section 5) and an objector other than a candidate to file appeal or a source information (sub-section (5-A)) against acceptance of such nomination papers before the election process is over. However, once that process comes to an end and a candidate is declared as elected, the election of a returned candidate can be challenged under sections 52 and 76-A of the Act. The

Election Tribunal decides the petition in the light of the following sections:-

(i) Section 68 of the Act i.e. ground for declaring election of returned candidate void;

(ii) Section 69 of the Act i.e. ground for declaring a person other than a returned candidate elected; and

(iii) Section 70 of the Act i.e. ground for declaring election as a whole void.

42. The mandate of Article 225 of the Constitution with reference to powers of High Court under Article 199 came under consideration before this Court in Election Commission of Pakistan through its Secretary v. Javaid Hashmi and others (PLD 1989 SC 396). In the said case, the order of the Lahore High Court reversing the order of the Returning Officer regarding the posting of polling staff and other arrangements was challenged and the precise submission before this Court was that the learned High Court had interfered with the order passed with jurisdiction by the Returning Officer while the election process was going on. This Court allowed the appeal holding that in view of Article 225 of the Constitution, the writ petition was not competent. This Court after discussing a plethora of precedent case law including from Indian jurisdiction concluded that the word 'election' in Article 225 has been used in a wider sense to connote the entire process culminating in a candidate declared to be elected. Dilating on the import of Article 225 and the parameters of High Court's jurisdiction under Article 199 of the Constitution, it was held as follows:-

> *"In enacting Article 225 in the Constitution the purpose of Legislature is obvious that it did not contemplate two attacks on matters connected with the election proceedings; one while the election process is on and has not reached the stage of its completion by recourse to an extraordinary remedy provided by Article 199, and another when the election has reached the stage of completion by means of an election petition. It is also of utmost consideration that in the case of two attacks on a matter connected with the election proceedings there is likelihood of there being two inconsistent decisions; one given by the High Court and the other by the*

> *Election Tribunal which is also an independent Tribunal and this could not be the intention of the Legislature. Again the words "except by an election petition" in Article 225 of the Constitution do not refer to the period when it can be called in question but point to the manner and the mode in which it can be called in question. It is, therefore, that the constitutional provision is expressed in the negative form to give exclusive jurisdiction to the Tribunals appointed by the Election Commissioner and thus to exclude or oust the jurisdiction of all Courts in regard to election matters and to prescribe only one mode of challenge. The purpose is not far to seek as in all democratic constitutions such as is ours the Legislatures have an important role to play, and, therefore, it is of utmost importance that the election should be held as scheduled without being unduly delayed or prolonged by challenging matters at an intermediate stage."*

43. In Ghulam Mustafa Jatoi v. Addl. District & Sessions Judge/Returning Officer, N.A. 158, Naushero Feroze and others (1994 SCMR 1299), this Court provided for interference under Article 199 of the Constitution during the election process in exceptional circumstances i.e. the order sought to be impugned is patently illegal and the person aggrieved is left with no remedy either before or after the election process. At Page-26, it was held as follows:-

> *"The upshot of the above discussion is that generally in an election process the High Court cannot interfere with by invoking its Constitutional jurisdiction in view of Article 225 of the Constitution. However, this is subject to an exception that where no legal remedy is available to an aggrieved party during the process of election or after its completion, against an order of an election functionary which is patently illegal/without jurisdiction and effect of which is to defranchise a candidate, he can press into service Constitutional jurisdiction of the High Court."*

44. In Ayatullah Dr. Imran Liaquat Hussain v. Election Commission of Paksitan Islamabad and another (PLD 2005 SC 52), petitioner under Article 199 of the Constitution had sought direction to reject nomination papers of those candidates who were not faithful to the declaration by the Founder of Pakistan. The High Court dismissed the writ petition and this Court upheld the judgment of the High Court

and while reiterating the law laid down by this Court in several judgments including **Javed Hashmi** *(ibid)* came to the conclusion as follows:-

> *".....High Court, under Article 199 has no power to interfere with the process of election at an intermediate stage or question the correctness of the decision of the Election Tribunal on any ground whatsoever upon an election petition filed to question the validity of the election. Exercise of power under Art. 199 cannot be placed on any higher footing than that emanating from Art. 225. Article 225 is expressed in the negative form to give exclusive jurisdiction to the Tribunals appointed by the Election Commission and thus to exclude or oust the jurisdiction of all Courts in regard to election matters and to prescribe only one mode of challenge. The Election Tribunals are final judges of facts as well as of law, including the interpretation of law and, it would be incorrect to say that their determinations are "without lawful authority" because the High Court does not agree with them. All questions of law which have to be decided for determination of the election disputes must be decided and finally decided only by the authorities mentioned in Article 225. The Article is intended to protect the determinations of the authorities designated in it from being subjected to judicial review by the High Court under Article 199 on grounds such as an error of law apparent on the face of the record."*

45. In Ltd. Gen.(R) Salahuddin Tirmizi v. Election Commission of Pakistan (PLD 2008 SC 735), the ratio laid down in the earlier judgment of this Court has not been revisited rather the same has been reiterated and the Court re-affirmed the view taken by this Court in Aftab Shahban Mirani v. President of Pakistan and others (1998 SCMR 1863), wherein it was observed as follows:-

> *"In consequence to the above discussion, we hold that the scope of interference of the High Court in its jurisdiction under Article 199 of the Constitution in election cases is very limited to the extent of matter which do not exclusively fall within the ambit of jurisdiction of election Tribunals or Election Commission of Pakistan or in respect of the orders which are coram non judice, without jurisdiction or mala fide. The interference of the High Court in the orders passed by Election Commission of Pakistan in discharge of its duty in terms of Articles 218 & 219 of the Constitution*

read with sections 103 and 103-AA of Act 1976 in the normal circumstances is not justified."

46. The Court, however, upheld the judgment of the Peshawar High Court wherein it had directed that on account of the grievance expressed by the voters of certain polling stations in Kaghan area due to land sliding and blockade of roads, their application filed under section 103-A of the Act be disposed of on their own merits after providing an opportunity of being heard to the parties. In the said case, no finding of fact touching the eligibility of candidate was involved and no enquiry was entailed in writ jurisdiction of the court.

47. After the judgment of Javed Hashmi's case (**ibid**), this Court had provided a limited window in writ jurisdiction under Article 199 of the Constitution to challenge an order passed by a functionary of the Election Commission during currency of the election process or after the said process is over, provided the said order is patently illegal, the law does not provide remedy either before or after the election process and if the order relates to disqualification of a candidate, the alleged disqualification is floating on surface requiring no further probe. In the instant petitions, in the case of Mian Muhammad Nawaz Sharif, it was alleged that he was a convict in a NAB reference case; that the 'Presidential Pardon' granted to him was relatable only to remission of sentence and the conviction remained intact; that he had defamed the judiciary and that he had defaulted in payment of bank loans. So far as the issue of presidential pardon is concerned, it has been conceded at all the three stages by the Federal Government through the Deputy Attorney General and the Attorney General for Pakistan i.e. before the High Court, before this Court when the civil petitions were argued and during the hearing of review petitions that the petitioner was granted pardon. They have not pleaded that the 'pardon' was confined to sentence only. In the civil petitions and the review applications filed by the Federal Government, a specific prayer has been made that he be allowed to contest the elections. In the face of the afore-referred stance of Federation of Pakistan, the respondent-writ petitioners/objectors at no stage i.e. either before the Returning Officer or before the Election Appellate Tribunal or before the High Court or before this Court could

show that the pardon was confined to sentence or that it was conditional. Similarly, no court order was placed on record to indicate that petitioner was either convicted in a contempt case or any observation was made by any Court to that effect or that he had defaulted in payment of bank loans or that he was owner of a company "mainly owned by him" (as required under section 12(2)(f) of the Act) which had defaulted in payment of loans to be hit by the penal clauses of Article 63 (h) (l) of the Constitution or section 99 of the Act. In absence of any document or conclusive order or material to the contrary, the Returning Officer was left with no option but to declare him qualified and to accept his nomination papers for the limited purpose of scrutiny in terms of section 11 of the Act.

48. In the case of Mian Muhammad Shahbaz Sharif, there was no conviction in a criminal case but the other grounds were similar i.e. he had defamed judiciary and that he had defaulted in payment of loans to the bank. However no document tenable in law was placed on record from which it could be inferred that he was hit by the afore-mentioned disqualifying provisions of law. We would refrain from making any further observation in these proceedings on the merits of the allegations levelled as they raise disputed questions of fact requiring probe and factual enquiry. Suffice it to say that the alleged disqualifications in the cases of both the petitioners were not floating on surface warranting High Court to interfere under Article 199 of the Constitution.

Issue No.(v) *Whether the judgments under review are violative of the fundamental rights provision of the Constitution and if so whether this could constitute a valid ground to review the impugned judgments of this Court?*

49. Article 188 of the Constitution provides for the review jurisdiction of this Court which reads as under:-

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

50. As is evident from a bare reading of this Article, this power is subject to an Act of the Parliament and to the Rules made by the Supreme Court. In terms of Supreme Court Rules Part (IV) Order XXVI (1), the Court reviews its judgment or order in civil proceedings on the grounds similar to those mentioned in Order XLVII Rule (1) of the CPC and in criminal proceedings on the ground of an error apparent on the face of record. Order XLVII Rule 1 CPC reads as under:-

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

51. In Abdul Ghaffar-Abdul Rehman v. Asghar Ali (PLD 1998 SC 363), this Court while discussing in depth the case law on the powers of review laid down certain principles which the Court may consider while exercising this power, those are as follows:-

> *"(i) That every judgment pronounced by the Supreme Court is presumed to be a considered, solemn and final decision on all points arising out of the case;*
>
> *(ii) That if the Court has taken a conscious and deliberate decision on a point of fact or law a review petition will not lie;*
>
> *(vi) that the fact the view canvassed in the review petition is more reasonable than the view found favour with the court in the judgment/order of which review is sought, is not sufficient to sustain a review petition;*
>
> *(vii) that simpliciter the factum that a material irregularity was committed would not be sufficient to review a judgment/order but if the material irregularity was of such a nature, as to convert the process from being one in aid of justice to a process of injustice, a review petition would lie;*
>
> *(viii) that simpliciter the fact that the conclusion recorded in a judgment/order is wrong does not warrant review of the same but if the conclusion is wrong because something obvious has been overlooked by the Court or it has failed to consider some important aspect of the matter, a review petition would lie;*
>
> *(ix) that if the error in the judgment/order is so manifest and is floating on the surface, which is so material that had the same been noticed prior to the rendering of the judgment the conclusion*

would have been different, in such a case a review petition would lie;

(x) that the power of review cannot be invoked as routine matter to re-hear a case which has already been decided or change of a counsel would warrant sustaining of a review petition, but the same can be pressed into service where a glaring omission or patent mistake has crept in earlier by judicial fallibility;

(xi) that the Constitution does not place any restriction on the power of the Supreme Court to review its earlier decisions or even to depart from them nor the doctrine stare decisis will come in its way so long as review is warranted in view of the significant impact on the fundamental rights of citizens or in the interest of public good;

(xii) that the Court is competent to review its judgment/order suo moto without any formal application;

(xiii) that under the Supreme Court Rules, it sits in divisions and not as a whole. Each Bench whether small or large exercises the same power vested in the Supreme Court and decisions rendered by the Benches irrespective of their size are decisions of the Court having the same binding nature."

52. If we were to apply the afore-referred ratio laid down by this Court to the cases in hand, we note that the findings under review disqualifying both the petitioners to contest the elections for all times to come are violative of the fundamental right provisions of the Constitution which have been considered as valid grounds to review in the precedent case to which reference has been made in the preceding paragraph. Article 4 of the Constitution relates to the right of

individuals to be dealt with in accordance with law and provides as follows:-

> *"**4.---(1)** To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.*
>
> *(2) In particular—*
>
> *(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;*
>
> *(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and*
>
> *(c) no person shall be compelled to do that which the law does not required him to do."*

53. Article 17 guarantees the right of every citizen to form association or union and to be member of a political party. As leaders of a political party, petitioners have high stakes in retaining a certain public image. To be declared disqualified to contest the elections and the findings that petitioners are not "sagacious", "righteous", "are guilty of contempt" and of having defaulted in payment of loans are punishments and has the effect of depriving the petitioners of their fundamental rights guaranteed under the afore-referred provisions of the Constitution. These findings/declarations could not have been given except with due process of law, which, inter alia, required that the election schedule notified under section 11 of the Act is honored in letter and spirit; the objections/appeals filed against the acceptance of petitioners' nomination papers are disposed of within the period as provided in law (Election Schedule); the order of the Chief Election Commissioner dated 1.6.2008 passed with jurisdiction giving effect to the mandatory provision of sub-section (6) of section 14 of the Act was not interfered with unless it was patently illegal and the objectors were left with no remedy either before or after the election process. The canons of due process further required that the findings adversely affecting their dignity, liberty, reputation and political rights are not given ex-parte and that too in writ jurisdiction without recording of

evidence and in derogation to the mandate of Article 225 of the Constitution.

54. The Constitution of Pakistan provides for a democratic system of governance, *"wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed."* But democracy does not mean merely holding of periodical elections or a government by a political party having majority in the Parliament. It epitomizes the cherished values of freedom, democracy, due process and the rule of law. It encompasses a whole range of socio-political and economic rights. These rights cannot be realized unless honored by the government and protected through an independent judiciary. Democracy without the rule of law becomes rule of the mob or illiberal democracy i.e. a system where rights of minorities are not protected and where human rights regime suffers badly. There are instances when those voted to power, attempted to destroy the very process of which they were the product. This is how countries drift towards illiberal democracy. Such aberrations of power leading to distortion of constitutional framework or its deviation underpin the importance of substantive democracy and judicial independence. Every organ of the government and every State institution through its actions and policies has to protect the Constitution—its values, its principles and the rights it embodies. But the judiciary has a crucial role to play. A Judge, be it a Civil Judge or a Judge of a Superior Court, is the protector of rights and an arbiter of conflicting claims. A Judge of the Supreme Court besides protecting the Constitution and its values is an interpreter of law and while doing so bridges the gap between the law and the society to ensure complete justice. When called upon, he or she also reconciles the two conflicting provisions in a Statute to give effect to the legislative intent. While deciding these petitions, we were conscious of this role of the Supreme Court. Accountability of holders of public offices with a view to disqualify those who are found guilty is a laudable object. But if this exercise is to be credible, it has to be across the board, has to be fair, and has to be regulated by the rule of law. A process bereft of these elements may boomerang and defeat the very purpose of the process initiated.

55. The foregoing sums up the detailed judgment of this Court's short order delivered on 26.05.2009 in terms of which Civil Review Petitions No. 59 and 60 of 2009 filed by Mian Muhammad

Nawaz Sharif and Civil Review Petitions No. 61 and 62 of 2009 filed by Mian Muhammad Shahbaz Sharif were allowed. Consequently the orders of Returning Officer in the case of Mian Muhammad Nawaz Sharif dated 15.05.2008 and in the case of Mian Muhammad Shahbaz Sharif dated 16.05.2008 as also of the Chief Election Commissioner dated 01.06.2008 were restored. Criminal Review Petition No. 22 of 2009 filed by Javed Mehmood was also allowed because the order under review was passed without hearing the petitioner. All the remaining civil review petitions and civil miscellaneous applications were dismissed as not maintainable. Civil Miscellaneous Application No. 1597 of 2009 filed by Mr. Ahmad Raza Qasuri, ASC praying for production of the pardon order was also dismissed as not maintainable and misconceived because this application was filed after almost two days of the arguments having been concluded in C.R.P. No.59 & 60 of 2009 and secondly a probe on merits was the exclusive preserve of a Court/Tribunal of plenary jurisdiction and this Court could not enter into factual enquiry in proceedings arising out of a petition under Article 199 of the Constitution in the peculiar facts and circumstances of this case. Even otherwise, the respondent had not made such a prayer during the hearing of main petitions.

NASIR-UL-MULK, J.- I have had the privilege of reading the well reasoned judgment proposed to be delivered by my lord, Mr. Justice Tassaduq Hussain Jillani, and entirely agree with the conclusions drawn. However, I would like to add a short note on the maintainability of the writ petitions filed before the Lahore High Court by Syed Khurram Ali Shah and Noor Elahi.

2. It will be appropriate to recapitulate some of the relevant facts relating to the said issue. In the case of Mian Muhammad Nawaz Sharif, another candidates for the constituency N.A. 123 (Lahore-IV) Mian Muhammad Ikhlaq Ahmed, had filed objection petition before the Returning Officer to the candidature of Mian Muhammad Nawaz Sharif. The Returning Officer rejected the objection on 15.5.2008, whereupon the said candidate filed appeal before the appellate Tribunal under section 14(5) of the Representation of Peoples Act, 1976 (hereinafter called the Act). It was withdrawn on 17.5.2008 and on the same day another candidate, Noor Elahi, moved an application under Order 1 Rule 10, C.P.C. for impleadment as party to the appeal of Mian Muhammad Ikhlaq Ahmed. The application was rejected as not maintainable but Noor Elahi was allowed to file an appeal, if he was so advised, which he did on 28.05.2008, though the last date for filing appeal was 24.05.2008. The appeal was titled 'Appeal under section 14(5)/Application under section 14(5A)'. One Syed Khurram Ali Shah, who was not an elector in the said

constituency, also filed an application under section 14(5A) of the Act laying information before the Tribunal for the disqualification of Mian Muhammad Nawaz Sharif. In view of divergence of opinion between the two members of the Tribunal, the Chief Election Commissioner, on 01.06.2008, declared that the appeals before the Tribunal stood rejected under section 14(6). Noor Elahi as well as Syed Khurram Ali Shah filed separate writ petitions before the Lahore High Court.

3. Turning to the case of Mian Muhammad Shahbaz Sharif, his candidature for the by-election of PP-48 (Bhakkar-II) was objected to in writing by a candidate, Mazhar Iqbal, on 15.05.2008. On the following day the said candidate withdrew the objection and thus the Returning Officer accepted the nomination papers of Mian Muhammad Shahbaz Sharif. However, the same Syed Khurram Ali Shah moved an application before the Appellate Tribunal under section 14(5A) of the Act on 24.05.2008, laying information and material before the Tribunal for the disqualification of Mian Muhammad Shahbaz Sharif. As in the case of Mian Muhammad Nawaz Sharif, the Chief Election Commissioner declared the application of Syed Khurram Ali Shah rejected under section 14(6) upon split opinion of the two Members of the Tribunal. On 03.06.2008 the Election Commission issued notification declaring Mian Muhammad Shahbaz Sharif as returned candidate for the said constituency and on the very next day, he took oath as Chief Minister Punjab. Syed Khurram Ali

Shah then filed writ petition No.6469/2008 before the Lahore High Court, assailing the election of Mian Muhammad Shahbaz Sharif, praying for, besides other reliefs, issuance of a writ of Quo Warranto.

4. The learned counsel for the petitioners in both the matters questioned the very locus standi of Syed Khurram Ali Shah, and even Noor Ellahi, to maintain writ petitions before the High Court and to further file petitions before this Court. To appreciate the merit of this contention, it will be proper to refer to certain provisions of section 14 of the Act, which lays down the procedure for scrutiny of the nomination papers of candidates. The un-amended sub-section (1) of section 14 provided that the Returning Officer was to conduct the scrutiny in the presence of the candidates, their election agents, proposers and seconders and one person authorized by each candidate. An addition through amendment was made in the said provision by Ordinance No. XXXVI of 2002, entitling an elector to raise objection to the nomination of any candidate of his constituency. In case of rejection or acceptance of nomination papers, a candidate alone has been conferred the right to file appeal to a Tribunal under sub-section 4. Initially the appeal was to be made to the Election Commission but through an amendment by Act No. IX of 1991, it was replaced by Tribunal constituted for the purpose. Though an elector has been conferred the right to file objection before the Returning Officer to the nomination of a candidate he has not

been given right of appeal to the Tribunal in case his objections are not sustained.

5. Under sub-section 5 of section 14, the appellate Tribunal exercises its jurisdiction regarding disqualification of a candidate upon an appeal filed before it. However, the Tribunal has now been conferred suo motu powers by sub-section 5A added to section 14 by Ordinance No. XXXVI of 2002, to inquire into the qualification of a candidate. The said provision reads as under:-

> *"If on the basis of any information or material brought to its knowledge by any source, a Tribunal constituted under sub-section (5) is of the opinion that a candidate whose nomination papers have been accepted is a defaulter of loan, taxes government dues or utility charges or has had any loan written off or suffers from any other disqualification from being elected as a member of an Assembly, it may, on its own motion, call upon such candidate to show cause why his nomination papers may not be rejected, and if the Tribunal is satisfied that the candidate is actually a defaulter as aforesaid or has had a loan written off or suffers from any disqualification, it may reject the nomination papers".*

6. Mr. Abid Hassan Minto, ASC, who appeared for Mian Muhammad Nawaz Sharif submitted that Syed Khurram Ali Shah, who had filed application under sub-section 5A for the disqualification of Mian Muhammad Nawaz Sharif was only an

informer and thus was not a party to the proceedings so as to entitle him to maintain a constitution petition when the information furnished by him did not lead to the disqualification of the candidate. The learned counsel referred to the findings regarding the locus standi of Syed Khurram Ali Shah in the judgment under review and argued that since election matters are regulated exclusively by statutory laws, laying down the procedure for different steps in the process of election, the maxim *ubi jus ibi remedium* is not attracted to the present case. The leaned counsel further laid stress that the power of the Tribunal under sub-section 5A to disqualify a candidate is restricted to the grounds mentioned therein, namely *"defaulter of loan, taxes, Government dues or utility charges or has had any loan written off"* and the words *"or suffers from any other disqualification from being elected as member of an Assembly"* is to be read *ejusdem generis* with the specific grounds mentioned therein and cannot be stretched so as to include all other grounds of disqualification prescribed by law.

7. Mr. Khawaja Haris, learned ASC, who represented Mian Muhammad Shahbaz Sharif also questioned the locus standi of Syed Khurram Ali Shah to file writ petition before the High Court and constitution petition before this Court.

8. Since the short order by which these petitions were allowed did not touch the merits of the grounds of disqualification of the petitioners, it will not be appropriate to dilate upon the issue whether the powers of the Tribunal under sub-section 5A

are restricted to the specific grounds mentioned therein. The question posing determination is the standing of a person furnishing information under the above provision to pursue the matter before the Tribunal and further before the Courts. The power conferred upon the Tribunal under sub-section 5A of section 14 is expressed to be exercised by it "on its own motion", based upon the knowledge it gains from source information or any material placed before it that might lead to the disqualification of a candidate. The "source" has not been defined in the Act and it could be an individual, an agency or Government department, a bank or any organization or body. Whereas the proceedings under sub-section 5 is formally initiated upon filing of an appeal, the process under sub-section 5A commences upon the issuance of show cause notice by the Tribunal to the concerned candidate. Since the show cause notice is based upon the information or material received or acquired by the Tribunal, it has first to evaluate tentatively its sufficiency and credibility. The standing of a person who furnishes information under sub-section 5A can in no way be equated with that of the appellant under sub-section 5A, who has a personal interest in the outcome of the proceedings. The status of such a person is simply of an informer laying information before the Tribunal of certain facts, which he believes disqualifies a candidate to contest the election. He has not been bestowed with any vested right to pursue the matter on a personal level to get a candidate disqualified. Needless to state that like all

powers exercisable suo motu, the Tribunal is empowered to summon the informer, or for that matter anyone, to appear before it to substantiate, clarify or throw light upon the contents of the show cause notice. The informer however does not become a party in the legal sense of the term to the proceedings before the Tribunal. The Tribunal's order rejecting the information and declaring the candidate concerned qualified cannot be termed as an order adverse to the interest of the informer. Such informer, therefore, would not be an aggrieved person within the meaning of Article 199 of the Constitution entitling him to file petition for issuance of a writ of Certiorari or Mandamus.

9. Returning to the facts, the appeal of Noor Elahi before the Tribunal was barred by time and neither did he file an application of condonation of delay nor had the Tribunal passed any specific order condoning the delay. Since Noor Elahi had moved the Tribunal under section 14(5) and alternatively under section 14(5A) and there being no order of the Tribunal condoning the delay, the matter was, seemingly considered and disposed of under section 14(5A). In this view of the matter, the status of Noor Ellahi and Syed Khurram Ali Shah, for the purpose of their locus standi, is the same and both were simply informers under section 14(5A).

10. Mr. Khawaja Haris, the counsel for Mian Muhammad Shahbaz Sharif, had pointed out that Syed Khurram Ali Shah, in his writ petition before the Lahore High Court, had moved an

application on 23.06.2008, for amendment, retaining only one prayer, that is, that in view of the split opinion of the appellate Tribunal on his application under section 14(5A), the Election Commission be directed to constitute another Tribunal for the disposal of his application. All other prayers for issuance of writs of Certiorari and Quo Warranto were proposed to be omitted. Sahibzada Ahmed Raza Qasuri, Sr. ASC, appearing for Syed Khurram Ali Shah, referred to the order dated 20.06.2008 of the High Court whereby the said application was dismissed as not pressed. He therefore contended that the writ petition was never amended as proposed in the application and thus all the prayers initially made therein remained intact. He also referred to the body of the writ petition in which a ground in terms of Quo Warranto was expressly taken up. Be that as it may, the High Court granted Syed Khurram Ali Shah only one prayer namely, direction to the Election Commission to refer the case to another Tribunal. This lends credibility to the statement made by Mr. Khawaja Harris at the bar that the learned counsel appearing for Syed Khurram Ali Shah in the High Court had eventually asked only for the said relief, dropping the rest. Even otherwise Syed Khurram Ali Shah, who had filed petition for leave to appeal in this Court from the judgment of the Lahore High Court had not made any prayer for issuance of Qua Warranto and felt aggrieved of the order of the Lahore High Court to the extent of allowing Mian Muhammad Shahbaz Sharif to continue to function as Chief Minister Punjab

and member of the Provincial Assembly till the decision of the Tribunal. Thus even if the writ petition of Syed Khurram Ali Shah before the Lahore High Court remained un-amended, he had given up the prayer for the issuance of Quo Warranto before this Court. Though no such prayer was made in the petition for leave to appeal by Syed Khurram Ali Shah, this Court, in the judgment under review, proceeded to disqualify Mian Muhammad Shahbaz Sharif. So far as the case of Mian Muhammad Nawaz Sharif is concerned, since he was never elected, Syed Khurram Ali Shah and Noor Elahi had not prayed for the issuance of Quo Warranto against him.

11. As the writ petitions filed before the Lahore High Court, eventually leading to the judgments under review, were for the issuance of either writ of Certiorari or Mandamus, they could have been maintained only by an aggrieved person within the meaning of Article 199 of the Constitution. As held above, neither Noor Elahi nor Syed Khurram Ali Shah fulfilled that condition. The writ petitions filed by these two persons were, therefore, not maintainable. Consequently, the petitions filed in this Court against the judgments of the Lahore High Court in the said writ petitions, culminating into the judgments under review, were also not maintainable.

12. In the judgment under review in the case of Mian Muhammad Nawaz Sharif, the maxim *ubi jus ibi remedium* (there is no wrong without remedy) was invoked in order to confer upon

Syed Khurram Ali Shah, and for that matter, Noor Elahi, the right to move the Court against the order of the Tribunal. With respect, the application of the said principle presupposes the existence of a legal right and is invoked when the law does not apparently provide a remedy for the enforcement of such right. The lacuna is filled up by applying the said maxim so as to provide such person with a remedy to grant him relief for a wrong suffered by him. As stated earlier, section 14(5A) does not confer any vested right on the informer and rejection of the information furnished by him is not a wrong against him in the legal sense so as to entitle him to a remedy.

13. Subject to the above, I agree with the findings in the main judgment on question of maintainability of the writ petitions filed in the High Court.

NASIR-UL-MULK

JUDGE