IN THE SUPREME COURT OF PAKISTAN
(ORIGINAL JURISDICTION)

PRESENT:
MR. JUSTICE NASIR-UL-MULK
MR. JUSTICE ASIF SAEED KHAN KHOSA
MR. JUSTICE SARMAD JALAL OSMANY
MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE IJAZ AHMED CHAUDHRY
MR. JUSTICE GULZAR AHMED
MR. JUSTICE MUHAMMAD ATHER SAEED

CRIMINAL ORIGINAL PETITION NO. 06 OF 2012
IN
SUO MOTU CASE NO. 04 OF 2010
(Contempt proceedings against Syed Yousaf Raza Gillani, the Prime Minister of Pakistan regarding non-compliance of this Court's order dated 16.12.2009)

For the Prosecution: Mr. Irfan Qadir, Prosecutor/ Attorney-General for Pakistan

For the Respondent: Barrister Aitzaz Ahsan, Sr. ASC, assisted by Barrister Gohar Ali Khan, Mr. Shaukat Ali Javid, Mr. Shahid Saeed, Mr. Kashif Malik, Mr. Bilal Khokar, Ms. Zunaira Fayyaz, Ms. Ayesha Malik, Mr. Fahad Usman, Mr. Tayyab Jan, Ch. Babras, Advocates with Mr. M. S. Khattak, AOR

Dates of Hearing: 19.01.2012, 01.02.2012, 02.02.2012, 13.02.2012, 22.02.2012, 28.02.2012, 07.03.2012, 08.03.2012, 21.03.2012, 22.03.2012, 26.03.2012, 27.03.2012, 12.04.2012, 13.04.2012, 16.04.2012, 17.04.2012, 18.04.2012, 19.04.2012, 20.04.2012, 24.04.2012 and **26.04.2012**

JUDGMENT

NASIR-UL-MULK, J.— These proceedings for contempt of Court initiated against Syed Yousaf Raza Gillani, the Prime Minister of Pakistan, emanate from non-compliance with the directions given by this Court to the Federal Government in Paragraphs No.**177** and **178** in the case of *DR. MOBASHIR HASSAN v FEDERATION OF PAKISTAN* **(PLD 2010 SC 265)** for the revival of the request, withdrawn by the former Attorney-General, Malik Muhammad Qayyum, to be a civil party in a money laundering case in Switzerland. To understand the context in which the said directions were given by this Court, it is inevitable to state some material facts.

2. It was in the fall of 1997 when the then Attorney-General for Pakistan wrote a letter to the Swiss Authorities investigating a money laundering case involving commissions and kickbacks paid by two Swiss Companies, COTECNA & SGS, in contracts granted to them by the Government of Pakistan. The Attorney-General requested that the Government of Pakistan be made a civil party in those proceedings so that in the event the payments of commissions and kickbacks were proved the amount be returned to the Government of Pakistan being its rightful claimant, with a further request for mutual legal assistance for the prosecution of such cases pending in the Courts in

Pakistan. The request was granted. It is not necessary for the purpose of the present proceedings to give further details of the proceedings held in Switzerland. Of relevance is the fact that the proceedings were still pending when on 15.10.2007 the President of Pakistan promulgated an Ordinance called "The National Reconciliation Ordinance 2007" (now commonly referred to as "the NRO"). The stated purpose for the promulgation of the Ordinance was *".....to promote national reconciliation, foster mutual trust and confidence amongst holders of public office and remove the vestiges of political vendetta and victimization, to make the election process more transparent and to amend certain laws for that purpose and for matters connected therewith and ancillary thereto;"* Broadly speaking, the Ordinance was designed to close investigation and prosecution of certain categories of cases pending before any of the investigation agencies and the Courts. Of significance for the present proceedings is Section 7 of the Ordinance which reads:-

> "7. **Insertion of new section, Ordinance XVIII of 1999.-** In the said Ordinance, after section 33E, the following new section shall be inserted, namely:-
>
> "33-F. Withdrawal and termination of prolonged pending proceedings initiated prior to 12th October, 1999.— (1) Notwithstanding any thing contained in this Ordinance or any other law for the time being in force, proceedings under investigation or

pending in any court including a High Court and the Supreme Court of Pakistan initiated by or on a reference by the National Accountability Bureau inside or **outside Pakistan including proceedings continued under section 33, requests for mutual assistance and civil party to proceedings initiated by the Federal Government before** the 12th day of October, 1999 against holders of public office stand withdrawn and terminated with immediate effect and such holders of public office shall also not be liable to any action in future as well under this Ordinance for acts having been done in good faith before the said date:
Provided……..”

3. The Ordinance and its various provisions were immediately challenged directly before this Court in a number of petitions filed under Article 184(3) of the Constitution. While those cases were pending, the then Attorney-General for Pakistan, Malik Muhammad Qayyum, in the light of the promulgation of NRO, addressed a letter on 09.03.2008 to the Attorney-General of Geneva for withdrawal of proceedings. The letter has been reproduced in Paragraph No. 124 of the judgment in *DR. MOBASHIR HASSAN’s* case and because of its relevance to the present proceedings, its contents are restated:-

“Dear Mr. Attorney-General,

We write you further to our meeting of 7 April 2008.

We hereby confirm that the Republic of Pakistan having not suffered any damage withdraws in capacity of civil party not only against ***Mr. Asif Ali Zardari*** *but also against* ***Mr. Jens Schlegelmich and any other third party concerned by these proceedings.*** *This withdrawal is effective for the above captioned proceedings as well as for any other proceedings possibly initiated in Switzerland (national or further to international judicial assistance). The Republic of Pakistan thus confirms entirely the withdrawal of its request of judicial assistance and its complements, object of the proceedings CP/289/97.*

Request for mutual assistance made by the then government, which already stand withdrawn, was politically motivated. Contract was awarded to reshipment inspection companies in good faith in discharge of official functions by the State functionaries in accordance with rules.

The Republic of Pakistan further confirms having withdrawn itself as a damaged party and apologizes for the inconvenience caused to the Swiss authorities.

Your sincerely,

Sd/-
Malik Muhammad Qayyum
Attorney-General for Pakistan."

4. On 16.12.2009 this Court in the case of *DR. MOBASHIR HASSAN* (ibid) declared the NRO void *ab initio* as a whole, particularly, Sections 2, 6 and 7 thereof, being ultra vires and violative of various Articles of the Constitution. It further declared that the Ordinance shall be deemed *non est* from the day of its promulgation and *"as a consequence whereof all steps taken, actions suffered, and all orders passed by whatever authority, any orders passed by the Courts of law including the orders of discharge and acquittals recorded in favour of accused persons, are also declared never to have existed in the eyes of law and resultantly of no legal effect"*. It was further held that all proceedings terminated in view of Section 7 of NRO, shall stand revived and relegated to the status of pre-5th of October, 2007 position. As to the letter written by Malik Muhammad Qayyum, the then Attorney-General for Pakistan, dated 09.03.2008 to the Attorney-General of Geneva, reproduced above, it was declared in Paragraph No. 177 of the judgment:

> *"Since in view of the provisions of Article 100(3) of the Constitution, the Attorney General for Pakistan could not have suffered any act not assigned to him by the Federal Government or not authorized by the said Government and since no order or authority had been shown to us under which the then learned Attorney General namely Malik Muhammad Qayyum had*

> *been authorized to address communications to various authorities/courts in foreign counties including Switzerland, therefore, such communications addressed by him withdrawing the requests for mutual legal assistance or abandoning the status of a civil party in such proceedings abroad or which had culminated in the termination of proceedings before the competent fora in Switzerland or other countries or in abandonment of the claim of the Government of Pakistan to huge amounts of allegedly laundered moneys, are declared to be unauthorized, unconstitutional and illegal acts of the said Makik Muhammad Qayyum."*

5. As a consequence of the above declaration that Malik Muhammad Qayyum was never authorized to send communication to the Attorney-General of Geneva, the Court gave the following direction in Paragraph No. 178 of the judgment:-

> *"Since the NRO, 2007 stands declared void ab initio, therefore, any actions taken or suffered under the said law are also non est in law and since the communications addressed by Malik Muhammad Qayyum to various foreign fora/authorities/courts withdrawing the requests earlier made by the Government of Pakistan for mutual legal assistance; surrendering the status of civil party; abandoning the claims to the allegedly laundered moneys lying in foreign*

> *countries including Switzerland, have also been declared by us to be unauthorized and illegal communications and consequently of no legal effect, therefore, it is declared that the initial requests for mutual legal assistance; securing the status of civil party and the claim lodged to the allegedly laundered moneys lying in foreign countries including Switzerland are declared never to have been withdrawn.* ***Therefore, the Federal Government and other concerned authorities are ordered to take immediate steps to seek revival of the said requests, claims and status."***

6. Despite the above clear declaration and categorical direction given by this Court on 16.12.2009, the Federal Government took no steps, whatsoever, towards implementation of the order. It was not until 29.3.2010 that a Bench of this Court, headed by the Hon'ble Chief Justice, while taking suo motu notice of a news item regarding promotion of one Ahmed Riaz Sheikh an NRO beneficiary as head of the Economic Crime Wing of the Federal Investigation Agency (FIA) notice was taken of non-implementation of the various directions given in *DR. MOBASHIR HASSAN's* case. The Court, therefore, in strong terms directed compliance regarding steps for revival of the cases, **including those outside the country.**

7. To understand why the present action was initiated against the Prime Minister of the country, it is

necessary to mention some of the many orders passed by this Court for the implementation of the said direction. The matter was again taken up by the Court on 30.03.2010 when the then Secretary, Ministry of Law, Justice & Parliamentary Affairs, Mr. Justice (Retd) Aqil Mirza, was summoned to the Court and questioned about the delay in the implementation. He sought time to furnish reply and on 31.03.2010 reports were submitted on behalf of the Ministry of Law, Justice & Parliamentary Affairs as well as the National Accountability Bureau (NAB). Copies of the reports were handed over to Mr. Anwar Mansoor Khan, the then Attorney-General for Pakistan, who sought time to go through the same and *"appraise the Court with regard to the compliance of the judgment in letter and spirit*". On 01.04.2010 the Court was informed that a letter was written to the Swiss Authorities by the Chairman NAB. The Court, however, was of the view that a request for being civil/damaged party to the proceedings in Switzerland shall be made by the Government of Pakistan, keeping in view the relations in between the sovereign States and by following the procedure adopted earlier. The direction was given in the morning and the matter was adjourned to the afternoon of the same day for a positive response. However, when the Attorney-General appeared at 1.30 p.m., he revealed that *"he did his best to have access to the record of the case lying with Ministry of Law, Justice & Parliamentary Affairs, but Mr. Babar Awan, Minister of the Ministry, was not allowing him to lay hands on the same for*

one or the other reason." Upon this statement, the Court summoned the Secretary, Ministry for Law, Justice & Parliamentary Affairs, the same day, who informed the Court that he had received three sealed envelopes from the Foreign Office, one addressed to him, the other two containing some material for the Attorney-General, Switzerland and another functionary. In the letter addressed to him opinion was sought regarding sending of the envelopes through Diplomatic Bags to Switzerland. That he kept the two envelopes at home in safe custody and was yet to form an opinion on the matter. Upon this disclosure, the Court observed:-

> *"....we have noted with great pain that, prima facie, the functionaries of the Law Department are not really interested to implement the judgment of this Court, because no sooner Secretary, Law received directions of this Court, they should have contacted the Attorney General as well as to Chairman, NAB to process the cases, during course of the day, when now it is already 4.00 pm rather he had left his house for office and kept those envelops in safe custody over there. Be that as it may, we direct the Secretary, Law to start process now and complete the same according to law and the diplomatic relations, following the procedure, which was followed when the reference was filed in 1997 and submit report in this behalf. In the meantime, learned Attorney General*

and Mr. Abid Zubairi, ASC shall remain in contact with him and provide whatever assistance they can extend to him."

8. The Court ordered the Attorney-General for Pakistan and Mr. Abid Zubairi, learned ASC for the NAB, to submit report to the Registrar of the Court to the effect *"that request for opening of Swiss cases has been forwarded accordingly and no lacuna is left therein;"* No such report was ever submitted. Rather, Mr. Anwar Mansoor Khan resigned from the office of the Attorney-General for Pakistan.

9. The matter of implementation of the judgment, thereafter, was placed before another Bench of this Court on 29.4.2010. On the said date, the Deputy Attorney-General appeared on behalf of the Federation, who knew next to nothing of the case. After a few adjournments when no progress was in sight, the Secretary, Ministry of Law, Justice & Parliamentary Affairs, was summoned by the Court for 13.05.2010. By then, Moulvi Anwar-ul-Haq, had taken over as Attorney-General for Pakistan, who informed the Court that the Secretary was indisposed at Lahore. Instead of turning up in Court the following day, he sent an application by fax from Lahore that he could not attend the Court as he had undergone a surgery and that he has resigned from his office. After Mr. Anwar Mansoor Khan, this was the second casualty of the implementation process.

10. In view of the above situation when no clear statement on behalf of the Government was forthcoming, the Court felt constrained to call the Minister for Law, Justice & Parliamentary Affairs. The then Minister, Mr. Babar Awan, appeared on 25.05.2010 and after making detailed representation, informed the Court that a summary has already been prepared and presented to the Prime Minister of Pakistan regarding implementation of the judgment relating to, *inter-alia*, revival of the Government's request to the Swiss Authorities. He was directed to file concise statement with the observation that it was *"clarified that the concise statement shall specify expressly the steps taken for the implementation of the afore-mentioned judgment."*

11. With the concise statement filed on behalf of the Federal Government, reference was made to the observation given by the Prime Minister on the Summary presented to him by the Ministry of Law, Justice & Parliamentary Affairs, and the same was reproduced in the order of this Court dated 10.06.2010 *"The Prime Minister has observed that Ministry of Law, Justice and Parliamentary Affairs has not given any specific views in the matter, as per Rules of Business, 1973. However, under the circumstances, the prime Minister has been pleased to direct that the Law Ministry may continue with the stance taken in this case."* Since the observation of the Prime Minister indicated that there was no specific view presented by the Ministry of Law,

Justice & Parliamentary Affairs, we, therefore, directed that the very Summary, on which the observations were made, be placed before the Court. Upon perusal of the Summary on 11.06.2010 the Court found that the proposal made to the Prime Minister was not for the implementation of Paragraph No. 178 of the judgment in *DR. MOBASHIR HASSAN's* case but rather for its non-implementation. The Court, therefore, ordered that the said Summary be totally ignored and a fresh one be submitted by the next date of hearing in terms of Paragraph No. 178. We were, however, disappointed when on the following day, we were informed by the Attorney-General for Pakistan that no summary at all was presented to the Prime Minister pursuant to our orders. Thereafter, these implementation proceedings were suspended by a larger Bench of this Court, hearing a petition filed by the Federation for review of the judgment in *DR. MUBASHIR HASSAN's* case.

12. The review petition was dismissed on 25.11.2011 by a short order, detailed judgment whereof is reported as *FEDERATION OF PAKISTAN v. DR. MUBASHIR HASSAN* **(PLD 2012 SC 106)**. The grounds taken up in the review petition are reproduced in the review judgment, two of which, Nos. XII and XIV, relate to Paragraph No. 178 of the judgment under review. In Paragraph No. 11 of the review judgment, reference was made to the submissions made on behalf of the Federal Government, including those relating to the said

Paragraph No. 178. The argument, regarding the said Paragraph, was taken note of in Paragraph No. 14 of the review judgment and rejected. The short order in the review petition has been reproduced in the final judgment, which concludes with the direction that "*the concerned authorities are hereby directed to comply with the judgment dated 16.12.2009 in letter and spirit* ***without any further delay****."*

13. After dismissal of the review petition, implementation of the judgment in *DR. MOBASHIR HASSAN's* case (ibid), with particular reference to Paragraph No. 178 thereof, was placed before a five-member Bench. The matter came up for hearing on 3.1.2012 and when the Attorney-General for Pakistan was asked as to whether any summary was submitted to the Prime Minister of Pakistan pursuant to the earlier order of 5.7.2010, the Attorney-General expressed his ignorance of any such development and, thus, the case was adjourned to 10.1.2012. When no positive response came from the Attorney-General for Pakistan, the Court passed a twelve pages order recapitulating the history of the implementation process and mentioned six options, besides others, which the Court could exercise for implementation of the judgment. The one that was eventually adopted in the first instance culminating in the present contempt proceedings was Option No.2 which states:-

> *"Proceedings may be initiated against the Chief Executive of the Federation, i.e. the Prime Minister, the Federal Minister for Law, Justice and Human Rights Division and the Federal Secretary Law, Justice and Human Rights Division for committing contempt of this Court by persistently, obstinately and contumaciously resisting, failing or refusing to implement or execute in full the directions issued by this Court in its judgment delivered in the case of Dr. Mobashir Hassan (supra).."*

14. The Attorney-General for Pakistan was put on notice *"....to address arguments before this Court on the following date of hearing, after obtaining instructions from those concerned, as to why any of the mentioned options may not be exercised by the Court".* It further issued a general notice that *"any person likely to be affected by exercise of the above mentioned options may appear before this Court on the next date of hearing and address this Court in the relevant regard so that he may not be able to complain in future that he had been condemned by this Court unheard."* The Attorney-General was further directed to inform all such persons mentioned in the order about its passage and of the next date of hearing. On the suggestion of the five-member Bench the Hon'ble Chief Justice enlarged its strength to seven.

15. On 16.1.2012, the Attorney-General for Pakistan appeared and informed the Court that the order of 10.1.2012

was communicated to all the relevant persons and the Authorities mentioned therein, including the President of Pakistan and the Prime Minister, but he had not received any instruction to be communicated to the Court. It was in these circumstances that the Court felt that it was left with no option but to issue show cause notice to the Respondent, the Prime Minister of Pakistan, under Article 204 of the Constitution of the Islamic Republic of Pakistan read with Section 17 of the Contempt of Court Ordinance (V of 2003), as to why he shall not be held in contempt of this Court. The Respondent (Prime Minister of Pakistan) appeared and personally addressed the Court generally, defended his inaction by referring to the immunity of the President of Pakistan and having acted on the advice tendered to him in the ordinary course of business. After granting preliminary hearing to the Respondent in terms of Section 17(3) of the Ordinance and hearing his learned counsel Barrister Aitzaz Ahsan, Sr. ASC, we decided that it was in the interest of justice to proceed against the Respondent in the contempt proceedings and framed the following charge:-

> *"That you, Syed Yousaf Raza Gillani, the Prime Minister of Pakistan, have willfully flouted, disregarded and disobeyed the direction given by this Court in* ***Para 178*** *in the case of "****Dr. Mobashir Hassan*** *v* ***Federation of Pakistan*** *(PLD 2010 SC 265)" to revive the request by the Government of Pakistan for mutual legal assistance and status of civil party and the*

claims lodged to the allegedly laundered moneys lying in foreign countries, including Switzerland, which were unauthorizedly withdrawn by communication by Malik Muhammad Qayyum, former Attorney General for Pakistan to the concerned authorities, which direction you were legally bound to obey and thereby committed contempt of court within the meanings of Article 204(2) of the Constitution of Islamic Republic of Pakistan 1973 read with Section 3 of the Contempt of Court Ordinance (Ordinance V of 2003), punishable under Section 5 of the Ordinance and within the cognizance of this Court. We hereby direct that you be tried by this Court on the above said charge."

16. Moulvi Anwar-ul-Haq, leaned Attorney-General for Pakistan, was appointed to prosecute the Respondent. On behalf of the prosecution, the Attorney-General tendered in evidence documents comprising the judgments in *DR. MOBASHIR HASSAN*'s case as well as in the review petition and all the orders passed from time to time relating to implementation of the judgment (Ex.P1 to P40). The Respondent in his defence produced only one witness, Ms. Nargis Sethi (D.W.1) who had remained the Principal Secretary to the Prime Minister during the relevant period. She tendered in defence two Summaries, Ex.D/1 dated 21.5.2010 and Ex.D/2 dated 21.9.2010, along with documents appended with the Summaries submitted to the

Prime Minister. The Prime Minister opted not to testify on oath but put up his defence through a written statement unaccompanied by his affidavit.

17. After recording of the evidence was completed and the learned counsel for the defence started his arguments, we were informed that Maulvi Anwar-ul-Haq had resigned as Attorney-General for Pakistan and in his place, the Federal Government appointed Mr. Irfan Qadir who then took over the prosecution.

18. The learned counsel appearing for the Respondent, raised a preliminary objection to the very trial of contempt by this Bench on the ground that since it initiated the proceedings suo motu, issued show cause notice and framed charge, it no longer remained competent to proceed with the trial, for to do so would be in violation of the principle of *'fair trial'* now guaranteed as a fundamental right under Article 10A incorporated in the Constitution by the Constitution (Eighteenth Amendment) Act, 2010. For the sake of facility, Article 10A reads:

> *"10A. For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."*

19. The learned counsel maintained that the principle of *'fair trial'* must fulfill two conditions, firstly that *'no one shall be condemned unheard'* and secondly that *'a person cannot be a judge in his own cause'*. Basing his

argument on second condition, it was contended that this Bench having already formed an opinion, even if *prima facie*, about the culpability of the Respondent, it was no longer competent to proceed with the trial. He clarified that it was not a question of recusal by the members of the Bench but that of their disqualification to sit in trial and give judgment. Emphasizing the importance of incorporation of Article 10A in the Constitution, the learned counsel maintained that it had brought about a radical change in the scope of the law relating to determination of civil rights and obligations as well as criminal charge, ensuring that every person shall be entitled to *'fair trial and due process*'. He pointed out that whereas many other fundamental rights enshrined in the Constitution had been made subject to law, such limits have not been imposed on the fundamental right under Article 10A. Further drawing distinction between Article 4 and Article 10A of the Constitution, it was argued that the former provision entitles every person to be treated in accordance with the law as it exists, whereas the latter confers a Constitutional right upon the individuals to a *'fair trial'* regardless of, and notwithstanding, any provision in a sub-constitutional law. That trial by this Bench will be in accord with the Contempt of Court Ordinance and would thus fulfill the requirements of Article 4 but would be void in view of Article 10A for it offends the principle of *'fair trial'.* That while admitting that the principle of the right to a *'fair trial'* was already well entrenched in our jurisprudence, the

learned counsel argued that Article 10A had graduated the rule to a higher pedestal of a fundamental right guaranteed by the Constitution. Conceding that under the ordinary law, there was an exception to the rule that *'no man can be a judge in his own cause'*, allowing a Judge, who takes suo motu notice of contempt, to try a contemnor, he contended that the exception is no longer valid after the introduction of Article 10A.

20. On the question as to whether the provisions of the Contempt of Court Ordinance, 2003 allowing the trial of contempt by a Judge, who issues notice and frames charge, can be challenged in collateral proceedings without a frontal attack through separate proceedings, the learned counsel submitted that if an existing law is void being inconsistent with any of the fundamental rights, enshrined in the Constitution, it must be ignored, for it becomes unenforceable in view of Article 8(1) of the Constitution. To substantiate this argument, reliance was placed upon the cases of *FAUJI FOUNDATION v. SHAMIMUR REHMAN* **(PLD 1983 SC 457)**, *SAIYYID ABUL A'LA MAUDOODI AND OTHERS v. THE GOVERNMENT OF WEST PAKISTAN AND OTHERS* **(PLD 1964 SC 673)**, *MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CHIEF JUSTICE OF PAKISTAN v. THE PRESIDENT OF PAKISTAN* **(PLD 2007 SC 578)**, *CHIEF JUSTICE OF PAKISTAN, MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY v. THE PRESIDENT OF PAKISTAN* **(PLD 2010 SC 61)**, *SINDH HIGH COURT BAR ASSOCIATION v. FEDERATION*

OF PAKISTAN **(PLD 2009 SC 879)**, *MIR MUHAMMAD IDRIS AND OTHERS v. FEDERATION OF PAKISTAN* **(PLD 2011 SC 213)**, *MUHAMMAD MUBEEN-US-SALAM v. FEDERATION OF PAKISTAN* **(PLD 2006 SC 602)**.

21. When it was pointed out to the learned counsel that he has not referred to any particular provision of the Contempt of Court Ordinance 2003, being inconsistent with Article 10A of the Constitution, the learned counsel submitted that the longstanding practice of the Court allowing a Bench taking suo motu notice, to try the contemnor is *'usage having the force of law'* within the meaning of Article 8 of the Constitution. Reference was made to the definition of the word *'usage'*, in Black's Law Dictionary, Wharton's Law Lexicon and Shorter Oxford English Dictionary. Furthermore that Article 10A is to be read into the Ordinance to provide for an omission therein so as to bring it in conformity with the said fundamental right. That the stipulation in Section 11(3) of the Ordinance barring a Judge, who initiates proceedings for *'judicial contempt'* as defined in the Ordinance, to try the contemnor, shall also be read into Section 12 of the Ordinance relating to proceedings in case of a *'civil contempt'*. To substantiate his arguments that this Court has in the past read into statutes omission made therein on the principle of *casus omissus,* the learned counsel cited the cases of *AL-JEHAD TRUST v. FEDERATION OF PAKISTAN* **(PLD 1996 SC 324)**, *KHAN ASFANDYAR WALI v.*

FEDERATION OF PAKISTAN **(PLD 2001 607)**. He also referred to the interim order in the case of *NADEEM AHMED v. THE FEDERATION OF PAKISTAN* **(Constitution Petition No. 11 of 2010 etc.)**, where this Court while referring certain proposals to the Parliament regarding the new procedure laid down under Article 175A in the Constitution for the appointment of Judges in the superior Courts, gave certain directions for appointments during the interregnum. In the same context reference was also made to *MD. SONAFAR ALI v. THE STATE* **(1969 SCMR 460)**.

22. The learned counsel maintained that a fundamental right can neither be surrendered nor waived. For this proposition he placed reliance upon *GOVERNMENT OF PAKISTAN v. SYED AKHLAQUE HUSSAIN* **(PLD 1965 SC 527)**, *PAKISTAN MUSLIM LEGUE (N) v. FEDERATION OF PAKISTAN*

(PLD 2007 SC 642) and *OLGA TELLIS v. BOMBAY MUNICIPAL CORPORATION* **(AIR 1986 SC 180)**, *COMMISSIONER OF INCOME TAX PATIALA v. M/S ROADMASTER INDS. OF INDIA* **(AIR 2000 SC 1401)**. That in any case the Respondent objected to his trial by this Bench after the charge was framed when the trial commenced. Additionally it was argued that *'due process'* under Article 10A requires that a person can only be tried by a competent Court or Tribunal and this Bench being not competent to try the Respondent, the trial militates against the principle of *'due process'*. Reference in this context was

made to the cases of *SHARAF FARIDI v. THE FEDERATION OF ISLAMIC REPUBLIC OF PAKISTAN* **(PLD 1989 Kar 404)**, *GOVERNMENT OF BALOCHISTAN v. AZIZULLAH MEMON* **(PLD 1993 SC 341)** and *AL-JEHAD TRUST v. FEDERATION OF PAKISTAN* (supra).

23. On the question as to whether the trial of the Respondent by this Bench would militate against the principle of *'fair trial'*, the learned counsel sought support from *THE UNIVERSITY OF DACCA v. ZAKIR AHMED* **(PLD 1965 SC 90)**, *THE GOVERNMENT OF MYSORE AND OTHERS v. J. V. BHAT ETC.* **(AIR 1975 SC 596)**, *FEDERATION OF PAKISTAN v. MUHAMMAD AKRAM SHEIKH* **(PLD 1989 SC 689)**, *NAFEESA BANO v. CHIEF SETTLEMENT COMMISSIONER, WEST PAKISTAN* **(PLD 1969 Lah 480)**, *ANWAR v. THE CROWN* **(PLD 1955 FC 185)**, *GOVERNMENT OF NWFP v. DR. HUSSAIN AHMAD HAROON* **(2003 SCMR 104)**, *MOHAPATRA & CO AND ANOTHER v. STATE OF ORISSA AND ANOTHER* **(1985 SCR 91, 322 AT P. 332)**, *AMARANTH CHOWDHURY v. BRAITHWAITE AND COMPMANY LTD. & ORS*; **(2002 (2) SCC 290).**

24. For the purpose of disqualification of a Judge due to pre-trial observation made by him, reliance was placed upon two judgments by the Supreme Court of United States; *MURCHISON'S* case **349 US 133** (1955) and *DANIEL T.*

TAYLER III v. *JOHN P. HAYES* **418 US 488** (1974).

25. The principle of right to *'fair trial'* has been acknowledged and recognized by our Courts since long and is by now well entrenched in our jurisprudence. The right to a *'fair trial'* undoubtedly means a right to a proper hearing by an unbiased competent forum. The latter component of a *'fair trial'* is based on the age-old maxim *"Nemo debet esse judex in propria sua causa"* that "*no man can be a judge in his own cause".* This principle has been further expounded to mean that a Judge must not hear a case in which he has personal interest, whether or not his decision is influenced by his interest, for *"justice should not only be done but be seen to have been done".*

26. Starting from the case of *THE UNIVERSITY OF DACCA v. ZAKIR AHMED* (ibid) this Court has consistently held that the principle of natural justice (right of hearing) shall be read in every statute even if not expressly provided for unless specifically excluded. The cases cited by the learned counsel from our own as well as from the Indian jurisdiction have only reiterated the above well established principle of law. In the case of *NEW JUBILEE INSURANCE COMPANY LTD. v. NATIONAL BANK OF PAKISTAN* **(PLD 1999 SC 1126)** this Court has gone to the extent of associating the right to a fair trial with the fundamental right of access to justice.

27. We agree with the learned counsel for the Respondent that the inclusion of the principle of right to a '*fair trial*' is now a Constitutionally guaranteed fundamental right and has been raised to a higher pedestal; consequently a law, or custom or usage having the force of law, which is inconsistent with the right to a *'fair trial'* would be void by virtue of Article 8 of the Constitution. However, the question here is whether trial of the Respondent for contempt by us having issued a show cause notice and framed the charge, would violate the Respondent's right to a *'fair trial'* on the ground that we have already formed a *prima facie* opinion in the matter having initiated suo motu action against the Respondent. While issuing a show cause notice for contempt, a Judge only forms a tentative opinion, which is subject to the ultimate outcome at the conclusion of the trial. In this regard one may refer to the lucid pronouncement by the late Hon'ble Mr. Justice Hamoodur Rahman, the then Chief Justice of Pakistan, while dealing with a Reference of misconduct against a Judge of the High Court in *THE PRESIDENT v. SHUAKAT ALI* **(PLD 1971 SC 585).** The Respondent Judge had submitted a statement of his properties and assets to the Supreme Judicial Council under Article 3 of the Judges (Declaration of Assets) Order, 1969 and the Council, upon scrutiny of the statement, submitted a report to the President, who then made a Reference to the Council to proceed against the Judge for gross misconduct. One of the objections raised by the Judge was that the Council as

constituted was disqualified from hearing the Reference, as it had earlier scrutinized the declaration of the assets of the Respondent and was, therefore, bound to be biased. The objection was rejected on two grounds; firstly, that there was no question or allegation of any bias on any individual member of the Supreme Judicial Council and the mere fact that the Council had scrutinized the declaration of assets was not sufficient to establish the likelihood of bias: *"for, if it were so then no Judge who issues a rule in a motion or issues notice to show cause in any other proceedings or frames a charge in a trial can ever hear that matter or conduct that trial. The reason is that a preliminary inquiry intended to determine whether a prima facie case has been made out or not is a safeguard against the commencement of wholly unwarranted final proceedings against a person. To say that a charge should be framed against a person amounts to saying nothing more than that the person should be tried in respect of it. Anybody who knows the difference between the prima facie case and its final trial, would reject the objection as misconceived."* The second ground for rejecting the objection was that of necessity, in that if sustained, there would be no forum or tribunal to hear the Reference, as the Supreme Judicial Council had the exclusive jurisdiction to hear the Reference and all its members had at the preliminary stage scrutinized the statement of declaration of assets of the Judge. This ground of necessity was reiterated in the case of *FEDERATION OF PAKISTAN v.*

MUHAMMAD AKRAM SHEIKH (ibid) where this Court, while reaffirming that the principle that "*no one should be a judge in his own cause* and *justice should not only be done but should manifestly appear to have been done,* were very salutary and fully entrenched judicial principles of high standard", acknowledged that a Judge, when otherwise disqualified on account of the said principles, may still sit in the proceedings if in his absence the tribunal or the Court having exclusive jurisdiction would not be complete.

28. In the case of *THE PRESIDENT v. SHUAKAT ALI* (ibid) the Supreme Judicial Council had on its own motion, after scrutinizing the statement of the respondent Judge, made a report to the President. The pronouncement by the then Chief Justice Hamoodur Rahman provides a complete answer to the objection of the learned counsel for the defence. The learned counsel had tried to draw a distinction between the exercise of contempt jurisdiction by the Court on its own motion and on the complaint of a party and it was contended that it is only in the former case that a Judge would stand disqualified to try a contemnor. This distinction we do not consider to be material. In both situations a Judge applies his mind before issuing notice to the respondent and later is to form a prima facie opinion after preliminary hearing whether or not to frame a charge and proceed with the trial. If it is held that a Judge holding a trial after having formed a *prima facie* or tentative opinion on merits of a case violates a litigant's fundamental right guaranteed under

Article 10A, it would lead to striking down a number of procedural laws and well established practices, and may land our judicial system into confusion and chaos; a Judge, who frames a charge in every criminal case, will stand debarred from holding trial of the accused; a Judge hearing a bail matter and forming a tentative opinion of the prosecution case would then be disqualified to try the accused; a Judge expressing a prima facie opinion while deciding a prayer for grant of injunction would become incompetent to try the suit. There may be scores of other such situations. Be that as it may, in all such situations the cause is not personal to the Judge and he has no personal interest in the matter to disqualify him.

29. The exception recognized by the two judgments of this Court cited above on the ground of necessity to the rule that "*no person shall be a judge in his own cause*" is also attracted here. After the show cause notice was issued to the Respondent, a preliminary hearing was afforded to the Respondent in terms of Sub-section (3) of Section 17 of the Contempt of Court Ordinance 2003. Upon conclusion of the hearing we decided to proceed further and frame a charge against the Respondent. This order was challenged through an Intra-Court Appeal filed under section 19 of the Ordinance. It was heard by an eight-member Bench of this Court, headed by the Hon'ble Chief Justice. The Appeal was dismissed and the order by this Bench, forming a *prima facie* opinion to frame the charge against the Respondent, was

upheld. Like the present, the Bench hearing the Intra-Court Appeal had also applied its mind to the existence or otherwise of a *prima facie* case. If the argument of the learned counsel is accepted, all the members of the Bench hearing the Intra-Court Appeal would be equally disqualified, thus, leaving only one Hon'ble Judge of this Court unaffected. No Bench could then be constituted to hear the contempt matter.

30. Out of the many judgments cited by the learned counsel, in only two, both by the United States Supreme Court, a Judge was held to be disqualified from trying a contemnor for his pre-trial conduct. In *RE MURCHISON* (supra), a Judge acting as one man Grand Jury, under the Michigan law, was investigating a crime and during the interrogation, formed an opinion that a policeman, Murchison, had perjured himself and that another person, by the name of White, had committed contempt for refusing to answer questions. Then acting in his judicial capacity he tried Murchison for contempt in open Court. The matter came up before the United States Supreme Court and while overturning the decision of the Michigan State Supreme Court held, by a majority of 7-3, that on the touchstone of *'fair trial'* by a fair tribunal the trial by the Judge was in violation of the principle that "*no man can be a judge in his own cause"*. This judgment turns on its own facts where the same person was the investigator, the complainant and the Judge and the information that he acquired during secret

investigation was used by him while sitting in his capacity as a Judge. The information on which the Judge held the contemnor in contempt was acquired by him not in his judicial but administrative capacity while investigating a case. That is why the Supreme Court observed that the Judge as an investigator was a material witness and trying the case deprived the contemnor of cross-examining him on the information that he had acquired during investigation and had used in the judicial proceedings. The case has no parallel with the one before us. *RE-MURCHISON (supra)* does not in any way lay down the broad proposition that a Judge, who in that capacity forms a *prima facie* opinion in a contempt matter, stands disqualified to try the contemnor. It was in the peculiar circumstances of the case that the Supreme Court found that the petitioner was not given a *fair trial* by a fair tribunal. Even then three members of the Court dissented, holding that the contempt proceedings could be protected on the principle that a Judge can try a person, who commits contempt in the face of the Court.

31. In *DANIEL T. TAYLER III* v. *JOHN P. HAYES* (ibid) a trial Judge had warned the defence counsel during proceedings before the jury in a murder case nine times for courtroom conduct that he was in contempt. After the criminal case was over, the same Judge sentenced the counsel on nine counts of contempt and on each count, sentenced separately to run consecutively, totaling almost four and half years. The matter came up before the United

States Supreme Court and it was held that on the facts of the case the contempt charge ought not to have been tried by the Judge; that although there was no personal attack on the trial Judge but the record showed that the trial Judge had become embroiled in a running controversy with the attorney and marked personal feelings were present on both sides during the trial, and the critical factor for the recusal being the character of the trial Judge's response to the attorney's misbehaviour during the trial, not the attorney's conduct alone. This case again does not in any way lays down that a Judge who forms a *prima facie* opinion in a case of contempt is debarred from trying the contemnor. The Supreme Court of United States considered the aversion the Judge had developed during the murder trial against the contemnor that disqualified him to hold his trial for contempt.

32. In both the above cases what prevailed with the Supreme Court of the United States to hold that the right to a *fair trial* was violated, was the pre-trial conduct and not the pre-trial observations of the Judge.

33. While incorporating Article 10A in the Constitution and making the right to a *'fair trial'* a fundamental right the legislature did not define or describe the requisites of a *'fair trial'*. By not defining the term the legislature, perhaps intended to give it the same meaning as is broadly universally recognized and embedded in our own jurisprudence. Thus in order to determine whether the trial of

the Respondent by this Bench violates the condition or the requisite of a *fair trial,* we have to fall back on the principles enunciated in this respect. Neither the learned counsel was able, nor did it come to our notice, any precedent or juristic opinion, that disqualifies a Judge, on the touchstone of *'fair trial'*, to try a case of which he had made a preliminary tentative assessment. We may add that as regards the members of this Bench, the Respondent as well as the learned counsel, had expressed full confidence. Indeed none of us has the remotest personal interest in the matter. The contempt proceedings arose out of non-implementation of the judgment of this Court. The cause is not of any member of the Bench but of the Court and in a wider sense of enforcement of the law. The legislature has already, in the Contempt of Court Ordinance 2003, provided a safeguard against trial by a Judge, who may have personal interest in the matter. Sub-section (3) of Section 11 of the Ordinance bars a Judge, who has initiated proceedings for *'judicial contempt'*, that is scandalizing or personal criticism of the Judge, to try the contemnor. The Judge is required to send the matter to the Chief Justice, who may himself hear or refer the case to any other Judge for hearing.

34. From the foregoing discussion, it follows that a Judge, making a *prima facie* assessment of a contempt matter whether initiated suo motu or on the application of a party, does not stand disqualified on the touchstone of the requirements of a '*fair trial',* from hearing and deciding the

matter. Thus our trial of the Respondent does not infringe upon the Respondent's fundamental right to a *fair trial* enshrined in Article 10A of the Constitution. The objection on this account is, therefore, not sustained.

35. The learned counsel then took up the issue of immunity of the President of Pakistan. He did not invoke the provisions of Article 248 of the Constitution, 1973, for the grant of immunity to the President of Pakistan and clarified that such immunity can be invoked by the President himself. His arguments on immunity were based on the Customary International Law. He pointed out that the present incumbent of the office of the President of Pakistan was tried for a criminal offence in a Court in Switzerland, which case now stands closed, yet the writing of the letter as directed could lead to the reopening of the case and trial of the President. That being head of the State, the President has absolute and inviolable immunity before all foreign Courts, so long as he is in the office, from any civil or criminal matter, for acts, private as well as official, done before or after taking office. That after leaving the office, he may become liable to such proceedings. The learned counsel made reference to the Vienna Convention on Diplomatic Relations, 1961 and Vienna Convention on Consular Relations, 1963, both of which have been made part of the law of Pakistan by the Diplomatic and Consular Privileges Act, 1972 (IX of 1972). Of relevance for the

present case is the Vienna Convention on Diplomatic Relations, 1961, where although no express provision has been made for grant of immunity to the Heads of States but it acknowledges in its Preamble the rules of Customary International Law and affirms that they shall govern questions not expressly regulated by the provisions of the Convention. The learned counsel then referred to the Memorandum by the Secretariat of the United Nation General Assembly approved in the 60th Session of the International Law Commission, Geneva in the year 2008 titled "**Immunity of State Officials from Foreign Criminal Jurisdiction**" from which a number of cases and opinions were cited to show that International as well as domestic Courts have all along recognized that immunity in civil as well as criminal matters are to be extended to Heads of States. Reference in particular was made to the cases decided by the International Court of Justice: *DEMOCRATIC REPUBLIC OF CONGO v. BELGIUM* **(2002 General List No. 121/ ICJ Reports 2002 p.3)** known as Arrest Warrant case, *DJIBOUTI v. FRANCE* (**ICJ Reports 2008 p.177)**, *QADDAFI v. FRANCE*

(International Law Reports, Vol. 125, pp.508-510), and decision of the House of Lords in *REGINA v. BOW STREET METOPOL,ITAN STIPENDIARY MAGISTRATE AND OTHERS, EX PARTE PINOCHET UGARTE (NO.30)* (House of Lords **[2000] 1 A.C. 147).** In view of the immunity, internationally recognized, granted to the Heads of States

while in office, the learned counsel maintained that the directions in Paragraph No. 178 in *DR. MOBASHIR HASSAN v. FEDERATION OF PAKISTAN* **(PLD 2010 SC 265)**, can and will be implemented, but only when the tenure of the present incumbent of the office to the President expires. The case of *A. M. QURESHI v. UNION OF SOVIET SOCIALIST REPUBLICS* **(PLD 1981 SC 377)** was cited to show that this Court had also recognized and applied Customary International law by granting immunity to foreign States. With reference to certain opinions expressed in Paragraphs No. 215 to 219 of the Memorandum by the Secretariat of the United Nation General Assembly, referred to above, it was contended that immunity is to be extended to the Heads of States whether or not invoked.

36. When the respondent appeared in person in response to the show cause notice and addressed the Court briefly, he gave two reasons for not communicating with the Swiss Authorities for implementation of the direction of this Court, firstly, that the President of Pakistan enjoys complete immunity inside and outside Pakistan and, secondly, that he acted upon the advice tendered to him in the ordinary course of business. No written reply to the show cause notice was submitted and the Respondent’s plea and defence in writing came only in the written statement filed by him at the close of evidence. In his statement, the Respondent did not confine his defence to acting upon the advice tendered to him but took a categorical stand that the

judgment of this Court cannot be implemented so long as Mr. Asif Ali Zardari remains the President of Pakistan. This plea of the Respondent is evident from Paragraphs No. 5, 46 and 79 of the written statement. The relevant parts of those Paragraphs are reproduced:-

> *"5. I may also respectfully point out that this Hon'ble Bench needs first to hear detailed arguments on my behalf why* ***Para. 178 of the judgment in the NRO case is not implementable at present only****, for the period Mr. Asif Ali Zardari is the incumbent President of Pakistan....."*
>
> *46.* ***I believe*** *that this is indeed the correct position in law and fact. As long as a person is Head of a Sovereign State he has immunity in both criminal as well as civil jurisdiction of all other states under international law. I believe this immunity to be absolute and inviolable, even though it persists only during the tenure of office. It thus vests in the office, not in the person. And it represents the sovereignty and independence of a country as well as its sovereign equality with all other states, howsoever strong and powerful. I think it wrong to subject the constitutionally elected incumbent President of Pakistan to the authority of a Magistrate in a foreign country. I think this subjection should be avoided."*
>
> *79. I therefore, believe that I have committed no contempt and that is a sufficient answer to the charge. I also believe that the Sovereign State of*

> *Pakistan cannot,* ***must not and should not*** *offer its incumbent Head of State, Symbol of the Federation (Art. 41), the most prominent component of Parliament (Art. 50), and the Supreme Commander of its Armed Forces (Art. 243) for a criminal trial in the Court of a foreign Magistrate, during the term of his office."*

37. The above position of the Respondent was, with vehemence, further urged by the learned counsel when concluding his arguments: that the Respondent is caught between implementing the judgment of this Court and maintaining the dignity and respect due to the office of the President of Pakistan. Thus, in very clear terms, he declared that the Respondent will not presently implement this Court's direction. Neither in the personal address by the Respondent before this Court nor in the written statement or in the submissions made on his behalf, slightest indication was given that the Respondent was ready to obey the Court's order as of now.

38. It is not necessary to examine or comment upon the case law cited by the learned counsel for the Respondent as the plea taken cannot prevail for a number of reasons. The ground of immunity under the International Law was expressly taken up by the Federal Government in grounds (xii) and (xvi) of the Review Petition (Civil Review Petition No. 129 of 2010 in Civil Petition No. 76 of 2007) in *DR. MUBASHIR HASSAN'S* case (ibid), with reference to

Paragraph No. 178 of the judgment. The grounds reproduced in Paragraph No. 4 of the review judgment reads:-

> *"(xii) that in para 178 of the detailed judgment, this Court has erred in ordering the Federal Government and other concerned authorities to seek revival of the said requests, claims and status* ***contrary to the principles of International Law in foreign countries****;*
> *(xvi) that the Court fell in error in not appreciating the functions of the Attorney General under Article100 of the Constitution i.e. it is the office of the said incumbent which is empowered to act or not to act in terms of its mandate and the letter written by then Attorney General for Pakistan to Swiss authorities to withdraw the prosecution was well within its mandate. The adverse finding recorded in this regard offended the principle of audi alteram partem. The observations made in paras 178 and 456 are in derogation to Article 4 of the Constitution as well;"*

39. The learned counsel appearing on behalf of the Federal Government in the Review, besides others, assailed Paragraph No. 178 of the judgment under review. The Full Court of 17 Judges rejected the arguments in Paragraph No. 14 in the following terms:

> *"14. The Court in para 178 of the judgment merely held that the communications addressed by the then*

> *Attorney General were unauthorized and the Federal Government was directed to take steps to seek revival of the request in that context. Neither during the hearing of the main case, learned counsel for the Federal Government placed on record any instructions of the Federation in this context nor during the hearing of this review petition, any such material was laid before this Court which could persuade us to hold that the said communication by the then Attorney General was duly authorized to warrant its review."*

40. The arguments regarding immunity under the International Law having been urged before the Full Court in review and not accepted, this seven-member Bench is in no position to examine the plea. Even otherwise, we are not sitting in review and, therefore, cannot go beyond what has been held therein.

41. When confronted with the above situation, the learned counsel submitted that he does not seek review of either Paragraph No. 178 or the decision in the review judgment but only prays for postponement of the implementation till the tenure of the present incumbent of the office of the President comes to an end. This contention, if accepted, would delay the implementation until, at least, the fall of 2013, when the present tenure of the President expires, and would amount to modification of the direction given in the main as well as in the review judgment in *DR.*

MOBASHIR HASSAN's case (ibid). Paragraph No. 178 concludes with direction to the Federal Government and other concerned authorities "*to take **immediate steps** to seek revival of the said request, claims and the status*". Similarly, the short order of 25.11.2011 dismissing the review petition carries similar direction that "*the concerned authorities are hereby directed to comply with the judgment dated 16.12.2009 in letter and sprit **without any further delay***." Acceptance of the Respondent's plea to delay the implementation of the direction of this Court would tantamount to review of the clear orders passed in both the judgments that the implementation is to be carried out immediately and without delay. This Bench has no power to modify the judgments and delay implementation.

42. Additionally, we have noted that the criminal cases before the Swiss Courts were initiated by the Swiss Authorities and not by the Government of Pakistan, which later applied to be made civil party claiming that the amount, if any, found to be laundered, be returned to Pakistan, being its rightful claimant. This position was not disputed by the learned counsel. In Paragraph No. 178, the Court had merely directed that the communication earlier made by the former Attorney-General, Malik Muhammad Qayyum, for withdrawal of the claim be withdrawn so that the civil claim of the Federal Government is revived. The consequences of the withdrawal of Malik Muhammad Qayyum's communication can only be examined and

adjudged by the investigators or courts in Switzerland, particularly, in view of the controversy raised on behalf of the Respondent that the cases were closed on merits, though we have noted that the documents speak otherwise.

43. Since complete facts of the case in Switzerland are not before us, we are in no position to form a definite opinion about its status when the claim was withdrawn nor indeed are we competent to give our own findings on the case, even for the limited purpose of determining the question of immunity. It is the authorities or the courts in that country alone which can, in the light of the facts before it, examine the question of immunity. The immunity can, thus, be invoked before the relevant authorities in Switzerland and, going by the arguments of the learned counsel, if the same is indeed available, it may be granted to the President of Pakistan without invocation.

44. Finally, besides Mr. Asif Ali Zardari there are others who were also accused in the criminal case in Switzerland. This has been impliedly admitted in the written submissions filed on behalf of the Respondent. By Reference to Ex.D1/3 and D2/2, mentioned in the Summary prepared for the Prime Minister, it is stated that presently, Mr. Asif Ali Zardari is the only Pakistani surviving accused in the case, thereby admitting the indictment of non-Pakistani accused. However there is express reference to other accused in the letter of Malik Muhammad Qayyum, withdrawing the claim stating that the “*Republic of Pakistan*

……. withdraws in capacity of civil party not only against Mr. Asif Ali Zardari but also against ***Mr. Jens Schlegelmich and any other third party concerned by these proceedings***". As the claim of the Government of Pakistan was to retrieve the laundered money and commissions, whether paid to Pakistani, Swiss or other foreign nationals, the defence of immunity, even if available to the present President of Pakistan, cannot be pleaded for the foreign national accused in the case. To their extent too the Respondent is reluctant to revive the claim of the Government of Pakistan for no understandable reasons.

45. An ancillary objection was raised by the learned counsel to the competence of the Supreme Court to implement its own judgments in view of clause (2) of Article 187 of the Constitution. The Article reads;

> *"**187**(1) [Subject to clause (2) of Article 175, the] Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document.*
>
> *(2)* ***Any such direction, order or decree*** *shall be enforceable throughout Pakistan and shall, where it is to be executed in a Province, or a territory or an area not forming part of a Province but within the jurisdiction of the High Court of*

> *the Province, be executed as if it had been issued by the High Court of that Province.*
> *(3) If a question arises as to which High Court shall give effect to a direction, order or decree of the Supreme Court, the decision of the Supreme Court on the question shall be final."*

The learned counsel submitted that since implementation of the judgment falls within territorial jurisdiction of the Islamabad High Court, that Court alone was empowered to implement this Court's orders or directions. We, however, understand that the said provision does not, in any manner, ousts this Court's power to enforce its decisions, particularly in view of its wide powers under Article 190 of the Constitution and under Article 204 to punish any person for disobeying the orders of the Court. Further, clause (1) of Article 187 of the Constitution only mandates that when the orders of the Supreme Court are to be enforced within a Province they shall be executed as if issued by the High Court of that Province; not that the execution is to be carried out by the High Court. We may add that this contention was not seriously urged and even otherwise we have found it misconceived.

46. Before taking up the arguments of the learned defence counsel on the factual aspects of the case, we may note here that Moulvi Anwar-ul-Haq, Attorney-General for Pakistan, who acted as the prosecutor on our orders and remained associated with this case almost till the end, was

replaced by Mr. Irfan Qadir, during the submissions by the learned defence counsel. The Attorney-General under Article 100 of the Constitution is appointed by the President on the advice of the Prime Minister. We found it intriguing that the Respondent exercising his such powers changed the officer of the Court prosecuting him. The learned Attorney-General did not put forth arguments in favour of the prosecution rather pleaded that there was no evidence, whatsoever, on the basis of which the Respondent could be held guilty of contempt. We were, thus, rendered one sided assistance only.

47. The learned Attorney-General in his arguments quoted some Paragraphs from *"Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to September 1990*" to explain his role as a prosecutor that he need not support the prosecution and was entitled to make independent assessment of the case and assist the Court in accordance with law and his conscience. However, all his arguments were in support of the defence and none whatsoever to support the charge against the Respondent. The learned Attorney-General began by submitting that there was no law of contempt in force in the country, in that, the Contempt of Court Ordinance 2003 having lapsed by efflux of time under Article 89 stood repealed under Article 264 of the Constitution and that Article 270AA did not protect the

said Ordinance. This question squarely came before this Court in **Suo Motu Case No.1 of 2007** (PLD 2007 SC 688) where it was held that the Contempt of Court Ordinance (V of 2003) holds the field. This judgment had been affirmed by this Court in *JUSTICE HASNAT AHMED KHAN v FEDERATION OF PAKISTAN* **(PLD 2011 SC 680)**. It was pointed out to the learned Attorney-General that even if there was no sub-constitutional legislation regulating proceedings of Contempt of Court, this Court was possessed of constitutional power under Article 204 to punish contemnors, with no restrictions on the exercise of power including that regarding quantum of punishment that can be imposed on the contemnor. The learned Attorney-General went on to criticize parts of the judgment in "*DR. MOBASHIR HASSAN*'s case (ibid). We, however, told him that the said judgment has been upheld by the Full Court in review and we cannot reopen the questions already decided. Concluding his arguments, he submitted, without elaborating, that the evidence on record does not establish the charge of contempt against the Respondent.

48. Coming to the facts of the case, the learned defence counsel contended that until the Review Petition of the Federal Government was dismissed on 25.11.2011 there had been no directions by the Court specifically to the Respondent. That when the matter of implementation was taken up after the dismissal of the review petition on 25.11.2011, the Court on 03.01.2012 only enquired of the

Attorney-General for Pakistan as to whether the Summary was prepared and placed before the Prime Minister in view of the directions given earlier, but again no direction was given to the Respondent. As regards the order of 10.01.2012, wherein the Court specifically mentioned the Prime Minister, the learned counsel submitted that the same was never communicated to the Respondent. That the statement of the Attorney-General before the Court on 16.01.2012 that he communicated the order of 10.01.2012 to the Prime Minister is not evidence of the fact of such communication without the Attorney-General testifying on oath to that effect. Reliance was placed on *G.S. GIDEON v. THE STATE* **(PLD 1963 SC 1)**. It was contended that the only order specifically and particularly addressed and communicated to the Respondent was the one passed on 16.01.2012, requiring him to appear before the Court. It was thus maintained that prior to the issuance of show cause notice to the Respondent on 16.01.2012 no other order with direction directly to the Respondent was brought to his notice. The learned counsel made reference to Paragraphs No. 74(i) and 74(v) of the written statement filed by the Respondent.

49. The learned counsel took us through various interim orders in order to show that at the early stages of the implementation process, directions were given to the officials of the Ministry of Law and the National Accountability Bureau (NAB) but never specifically to the

Respondent (the Prime Minister of Pakistan) and that too to prepare proper summaries for consideration of the Respondent. That the first Summary was returned by the office of the Prime Minister, as it did not give any clear opinion and on the second Summary the Prime Minister directed that the Supreme Court be informed that in view of the immunity to the President, its orders cannot be implemented. Referring to the Rules of Business, 1973, and the statement of Ms. Nargis Sethi (DW-1) the then Principal Secretary to the Prime Minister, the learned counsel contended that the Prime Minister was not to be blamed for the Summaries if not prepared in conformity with the directions of this Court. That it was the task of the then Law Secretary and the Attorney-General for Pakistan to prepare a proper summary and the contempt, if any, was committed by them and not the Respondent. In support of his contentions that the Respondent cannot be held personally responsible for any wrong advice tendered to him in the ordinary course of business, the learned counsel relied upon *DR. SUBRAMANIAN SWAMY v. DR. MANMOHAN SINGH,* a judgment of the Supreme Court of India in Civil Appeal No. 1193 of 2012, decided on 31.01.2012.

50. The learned counsel finally submitted that since the contempt proceedings are criminal in nature, entailing punishment, *mens rea* of the Respondent is to be established and it must be proved that his conduct was contumacious. That it would not be so if his decision is

justifiable on subjective assessment of the information placed before him. That knowledge of the Respondent of the orders of this Court cannot be presumed and must be proved. For the purpose of standard and burden of proof in contempt matters and whether the conduct of the Respondent was contumacious, the learned counsel provided us with a long list of cases, some of which are *MRITYUNJOY DAS AND ANOTHER v. SAYED HASIBUR RAHMAN AND OTHERS* **2001 (3) SC Cases 739,** *CHHOTU RAM v. URVASHI GULATI AND ANOTHER* **2001 (7) SC Cases 530**, *THE ALIGAR MUNICIPAL BOARD AND OTHERS v. EKKA TONGA MAZDOOR UNION* **1970 (3) SC Cases 98**, *BAHAWAL v. THE STATE* **(PLD 1962 SC 476),** *SMT. KIRAN BEDI AND JINDER SINGH v. THE COMMITTEE OF INQUIRY AND ANOTHER* **(AIR 1989 SC 714)**, *ISLAMIC REPUBLIC OF PAKISTAN v. MUHAMMAD SAEED* **(PLD 1961 SC 192)**, *ABDUL GHAFOOR v. MUHAMMAD SHAFI* **(PLD 1985 SC 407)**, *MIAN MUHAMMAD NAWAZ SHARIF v. THE STATE* **(PLD 2009 SC 814).**

51. Regarding lack of knowledge of the Respondent about directions given by this Court from time to time the arguments advanced by the learned counsel that he was not informed of any such direction given until 16.01.2012, loses significance in the light of the categorical stand taken by the Respondent when he appeared before this Court after issuance of the show cause notice, as well as in his written statement, that he is not for the time being willing and ready to carry out the order of this Court. This by itself establishes

his disobedience. Nevertheless we would proceed to examine his plea of acting on advice and that the orders for the implementation were not specifically directed towards him.

52. The defence examined Ms. Nargis Sethi (DW-1), the then Principal Secretary to the Prime Minister during the relevant period. She produced two Summaries prepared for the Prime Minister, dated 21.05.2010 (Ex.D1) and dated 21.09.2010 (Ex. D2) along with all the appended documents relating to the implementation of the directions given in *DR. MOBASHIR HASSAN*'s case (ibid). In the Summary of 21.05.2010, moved by the Ministry of Law, Justice & Parliamentary Affairs. The following proposals were placed before the Prime Minister for his approval:

> *"6. In view of above, the Hon'ble Prime Minister is requested to:*
>
> *(a) approve the Interim Report (Annex-A) and the stance taken by the then Law Secretary and submitted to the Hon'ble Supreme Court in the form of points (Annex-B)*
>
> *(b) approve the opinion of the former Attorney General at paras 9 and 10 of Annex-C.*
>
> *(c) any other ground which may be necessary to be taken in the court; and*
>
> *(d) any other instructions the Hon'ble Prime Minister may like to give in this regard.*

> *7. This Summary has the approval of Minister of Law, Justice and Parliamentary Affairs."*

53. On 24.05.2010 the following approval was given by the Prime Minister (Ex.D1/2)

> *"7. The Prime Minister has observed that Ministry of Law, Justice & Parliamentary Affairs has not given any specific views in the matter, as per Rules of Business, 1973. However, under the circumstances,* ***the Prime Minister has been pleased to direct that the Law Ministry may continue with the stance already taken in this case****."*

54. The stance referred to in the above approval taken by the Ministry of Law in Annex-B to the Summary (Ex.D1/3), about the present issue is mentioned in Paragraphs No. 1 & 2, reproduced as under:

> *"1. In connection with the question of revival of the proceedings which were pending before the Swiss Authorities it has to be respectfully brought to the kind notice of this Hon'ble Court that the proceedings pending in Switzerland against, Shaheed Benazir Bhutto, Mr. Asif Ali Zardari, (now President of Pakistan) and Begum Nusrat Bhutto etc. already stand disposed of, not only because Malik Muhammad Qayyum the Ex-Attorney General for Pakistan had applied for the withdrawal of the application for mutual assistance and for becoming civil party* ***but***

> ***the same had been closed on merits by the Prosecutor General, Geneva vide his order dated 25.08.2008****.*
> *2. It may be respectfully submitted further that the evidence had been recorded in the case and the investigation proceedings were closed by the Prosecutor General Switzerland mainly on account of the evidence recorded by the Swiss authorities.* ***In this view of the matter, it is submitted that no case whatsoever is pending which can be legally revived****. This submission is inline with the legal opinion recorded by Mr. Anwar Mansoor Khan, former Attorney General for Pakistan under Article 100(3) of the Constitution, who after perusal of NAB record including copies of the orders passed by the Swiss authorities opined that the case in Switzerland stood disposed of on merits and cannot be revived."*

55. The above Paragraphs mention the name of Mr. Asif Ali Zardari (now the President of Pakistan) and the stance taken is based on the order of the Prosecutor-General, Geneva, dated 25.08.2008 and the opinion of the then Attorney-General for Pakistan, Mr. Anwar Mansoor Khan, that the case in Switzerland had been closed on merits and therefore cannot be revived. Since it was time and again stressed that the case in Switzerland was closed on merits we need to take a look at the order of the Prosecutor General, Geneva, and the opinion of Mr. Anwar Mansoor

Khan. The former order is reproduced in the second Summary of the Ministry of Law (Ex.D2) at page No.47:

> *"10. As regards Asif Ali Zardari, the* ***Public Prosecutor of Pakistan****, after having initially involved Asif Ali Zardari, dropped all charges against him as well as against Jens Schlegelmilch, it being noted that the sentence pronounced in 1999 in Pakistan was revoked in 2001, that no new trial has been held in Pakistan since then that is since nearly 7 years.*
>
> *Besides this,* ***the Public Prosecutor*** *believed today that the proceedings have been initiated against Benazir Bhutto and her husband for political reasons.*
>
> *Furthermore,* ***Pakistan explains*** *withdrawal of proceedings highlighting that the procedure of allocation of contract to SGS /CONTECNA was not marred by irregularities, admitting hence that it believes that no act of corruption was committed.*
>
> *Finally, the testimonies collected from the files and reported above show no conclusive evidence that would allow invalidating the final observation made on the basis of the file by* ***the Public Prosecutor of Pakistan****.*
>
> *Therefore, the proceedings, stand closed."*

56. Reference to Public Prosecutor in the above order is to the then Attorney-General for Pakistan (Malik Muhammad Qayyum) and the order has been passed in response to his communication. The reasons broadly for

closing the case are on account of the opinion expressed by Malik Muhammad Qayyum, that the proceedings were initiated for political reasons; that neither there were irregularities in the allocation of the contract SGS/CONTECNA, nor any corruption committed. Giving due weight to these observations, the Prosecutor General, Geneva closed the case. We, therefore, entertain serious doubts regarding the claim that the case in Switzerland was closed on merits. Mr. Anwar Mansoor Khan, in his opinion dated 25.03.2010, also referred to the order of the Prosecutor-General, Geneva that the case has been closed on merits, but pointedly mentioned the judgment of this Court in *DR. MOBASHIR HASSAN*'s case (ibid) in the concluding Para (No.12):

> *"12. Notwithstanding the above, there is a judgment of the Hon'ble Supreme Court of Pakistan dated 16.12.2009 in DR. MOBASHIR HASSAN v. FEDERATION OF PAKISTAN (PLD 2010 SC 1) on the issue. It is therefore opined that the Federal Government may decide the issue keeping in view the fact and the judgment"*

57. In other words the then Attorney-General for Pakistan had opined that notwithstanding the closure of the case on merits, the judgment of *DR.MOBASHIR HASSAN*'s case (ibid) is still in the field. Though he did not put it plainly but what he meant was that it had to be enforced.

58. The Summary referred to Rule 5(1) and (2) of the Rules of Business and emphasized that *"it is the Chief Executive of the country who has the authority to approve or disapprove the view of the Minister."* The said Rule states:

> *"(1) No important policy decision shall be taken except with the approval of the Prime Minister.*
> *(2) It shall be the duty of a Minister to assist the Prime Minister in the formulation of policy."*

59. Reference was further made to Article 90 of the Constitution, clause (2) of which reads:

> *"In the performance of his functions under the Constitution, the Prime Minister may act either directly or through the Federal Ministers."*

60. The final decision in the matter was to be taken by the Prime Minister, being the Chief Executive of the Federation. This position was not disputed even by the learned counsel for the Respondent. All the relevant documents, including the opinion of the then Attorney-General for Pakistan, with particular reference to *DR. MOBASHIR HASSAN*'s case (ibid), along with the up to date interim orders of this Court, relating to implementation, were appended with the Summary. Out of the four proposals in the Summary, the last was for the Prime Minister to give any other instruction in that regard. This was not a Summary for the Prime Minister relating to a

routine business of the Government. It involved implementation of the judgment of this Court in a well publicized case of immense public importance in which the Federal Government was not only represented but had filed also a review petition. Above all it also involved the serving President of the country, whose name specifically appeared in Annex-B (Ex.D 1/3) of the Summary. Since the Respondent had selected one of the four proposals in the Summary, we have reasons to believe that he had applied his mind to the case and consciously approved the proposal given in Paragraph No. 6 (a), that the Law Minister shall continue with the stance already taken in the case, which was to the effect that the case cannot be revived as the same has been closed on merits. The decision thus taken in the first Summary by the Respondent was not to implement this Court's direction.

61. By the time the second Summary was placed before the Prime Minister on 21.09.2010. Mr. Justice (Retd.) Mohammad Aqil Mirza had resigned as Secretary Law and so had Mr. Anwar Mansoor Khan quit the office of the Attorney-General. The second Summary was prepared and placed by the new Law Secretary, Mr. Muhammad Masood Chishti. With this Summary, besides the documents appended with the first Summary, additional documents with fresh interim orders of the Court relating to the reopening of the Swiss cases were also appended. In Paragraph No. 17(A) of this Summary, besides the stand

taken in the first Summary that the investigation in the case already stood closed another reason for non-implementation of the judgment was taken, namely, that *"the Federal Government is bound to act under the* ***law and the Constitution*** *and present incumbent being the elected President of Pakistan cannot be offered for investigation or prosecution etc. to an alien land as* ***it militate against the sovereignty of the Islamic Republic of Pakistan****."*. It may be noted that in neither of the Summaries or the opinions forming part of the Summaries any reference was made to the immunity of the President under Article 248 of the Constitution or under the Customary International Law. According to Ex.D 2/2, the Principal Secretary to the Prime Minister, Ms. Nargis Sethi, on 23.09.2010, made the following note on the Summary:

> *"20. The Prime Minister has approved the proposal at para 17(A) of the Summary, which has also been endorsed by the Law Minister vide para 19, thereof.*
> *21. The Secretary, Law, Justice and Parliamentary Affairs, as well as, the Attorney General for Pakistan may appropriately explain the position to the Honourable Supreme Court of Pakistan."*

62. In her statement before this Court, Ms. Nargis Sethi (DW-1) had tried to explain that Paragraph No.21 reflects the decision of the Prime Minister. This, however, is not reflected from the Summary, as the Prime Minister had

only approved the proposal at Paragraph No.17(A) of the Summary, and it appears that Paragraph No.21 were the instructions coming from the Principal Secretary. Even if these were the instructions of the Respondent, the same were never communicated to the Court. In any case it only restates his consistent position of non-implementation.

63. The implementation proceedings can be conveniently divided into two stages. The first is up to the date when the Full Court suspended the implementation proceedings, and the second, after the dismissal of the Review Petition. The defence of the Respondent on merits in the main is that in the pre-review period the Court had not given direction specifically to the Respondent and orders passed in the post-review stage the only one communicated to him was of 16.01.2012, calling upon the Respondent to show cause. These pleas would have had some relevance if the Respondent upon appearance in the Court in response to the show cause notice had expressed his willingness and readiness to comply with the Court's directions. Instead he took a stand that he would not implement the directions as he believed that the same were not implementable. This stand of the Respondent continued right up to the conclusion of the trial. Many a time, during the hearing of these proceedings, the learned counsel for the Respondent was asked whether the Respondent would even now agree to write to the Swiss Authorities. The only response we received was that the letter cannot be written so long as Mr.

Asif Ali Zardari remains the President of Pakistan. The Respondent's stand amounts to saying that the order of this Court is non-implementable, as he believes that the same is not in accord with the Constitution of Pakistan and the International law. This argument, if accepted, would set a dangerous precedent and anyone would then successfully flout the orders of the Courts by pleading that according to his interpretation they are not in accord with the law. A judgment debtor would then be allowed to plead before the executing Court that the decree against him was inconsistent with the established law. No finality would then be attached to the judgments and orders of the Courts, even those by the apex Court of the Country. One may refer to the oft quoted aphorism of Robert Houghwout Jackson, J. about finality of the judgments of the Supreme Court of United States, *"..... there is no doubt that if there were a super Supreme Court, a substantial proportion of our reversals of the State Courts would be reversed.* ***We are not final because we are infallible, but we are infallible because we are final.***" The executive authority may question a Court's decision through the judicial process provided for in the Constitution and the law but is not entitled to flout it because it believes it to be inconsistent with the law or the Constitution. Interpretation of the law is the exclusive domain of the judiciary.

64. The learned counsel for the Respondent referred to the order of this Court dated 01.04.2010 by a Bench

headed by the Hon'ble Chief Justice that the matter of reopening of Swiss cases was to be dealt with according to the Rules of Business 1973, keeping in view the relations between the two sovereign States and that the Federal Government had followed the Court's order by adopting the procedure laid down in the Rules of Business by preparing summaries for the approval of the Prime Minister. The Court undoubtedly, and quite rightly, stated that the Rules be followed for the purpose of implementation of the Court's direction but unfortunately the Rules were used for its non-implementation. In this context, the learned counsel placed heavy reliance on the judgment of the Supreme Court of India in *DR. SUBRAMANIAN SWAMY v. DR. MANMOHAN SINGH* in Civil Appeal No. 1193 of 2012, decided on 31.01.2012. To appreciate the decision, some relevant facts of the case need to be stated. Dr. Subramanian Swamy was a private citizen and sought to prosecute for graft the Minister for Communication and Information Technology, Mr. A. Raja (Respondent No.2), alleging that on account of irregularities committed in the allotment of new licenses in 2G mobile services to two companies, Novice Telecom, viz. Swan Telecom and Unitech, in violation of the guidelines for the purpose; a loss of Rs.50,000/- crores was caused to the Government; for this purpose he submitted a representation to Respondent No.1, Dr. Manmohan Singh, the Prime Minister of India, who directed the concerned officers to examine and apprise him of the facts of the case. The

representation was placed before a Committee, headed by Respondent No.2, the Minister concerned. Since no action was taken thereafter on the representation, the appellant filed an appeal before the Supreme Court of India for prosecution of the Minister; one of the questions that came before the Supreme Court was the inaction of the Prime Minister on the representation of the appellant and the Court held that *"In our view, the officers in the PMO and the Ministry of Law and Justice, were duty bound to apprise respondent No.1 about seriousness of allegations made by the appellant and the judgments of this Court including the directions contained in paragraph 58(I) of the judgment in Vineet Narain's case as also the guidelines framed by the CVC so as to enable him to take appropriate decision in the matter. By the very nature of the office held by him,* ***respondent No.1 is not expected to personally look into the minute details of each and every case placed before him and has to depend on his advisers and other officers.*** *Unfortunately, those who were expected to give proper advice to respondent No.1 and place full facts and legal position before him failed to do so. We have no doubt that if respondent No.1 had been apprised of the true factual and legal position regarding the representation made by the appellant, he would have surely taken appropriate decision and would not have allowed the matter to linger for a period of more than one year."* The Court emphasized two points. Firstly, that the officers in the PMO

and the Ministry of Law and Justice were under a duty to apprise the Prime Minister about the seriousness of the allegation and that the Prime Minister was not expected to look into minute details of each and every case placed before him and has to depend upon his officers and advisors. The Court further observed that had the Prime Minister been properly apprised of the true and legal position, he would have taken an appropriate decision. The situation in the case before us is totally different from *DR. MANMOHAN SINGH*'s case (ibid). Here the case did not involve any intricate or minute details which required resolution. It was a straightforward case for implementation of the judgment of this Court on which there could have been no two views. Even if there was any, the Respondent never approached the Court for clarification. It was not a matter where the Respondent was left with any discretion. He was supposed to give a formal approval or direction to implement the decision of the Court. As it turned out during the current proceedings, the Prime Minister had never intended to comply with the orders of this Court regardless of any advice. He cannot shift the blame or the responsibility to his advisors for not giving him proper advice. The Respondent has taken a conscious decision in that and he must accept responsibility for the same. Even the case of *MIAN MUHAMMAD NAWAZ SHARIF v. THE STATE* (ibid) does not further the case as there Nawaz Sharif had to take a decision one way or the other on the advice that was

tendered to him. The Respondent had no option but to order the implementation of this Court's direction, particularly after the review of the Federal Government was dismissed.

65. After the review petition filed by the Federal Government was dismissed on 25.11.2011 with a clear direction that the judgment in *DR. MOBASHIR HASSAN*'s case (ibid) shall be implemented without any further delay, the matter of implementation proceedings were revived. On 10.1.2012 (Ex.P.22) a detailed order was passed directly putting the Respondent on notice to implement the orders lest the proceedings for contempt of Court be initiated. The learned Attorney-General on the following date on 16.01.2012 (Ex.P.23) informed the Court that the said order was duly communicated to the President of Pakistan and the Prime Minister of Pakistan but that he had not received any instruction. The learned counsel for the Respondent submitted that the value of such statement by the Attorney-General is only evidence that statement was made but not of its contents unless the Attorney-General testifies on oath to the correctness of the statement. We are afraid we cannot accept this argument as the Attorney-General for Pakistan is the principal law officer of the Federation and the statements made by him before the Court are official communications and shall, thus, be presumed to be correct, unless validly contradicted. Although the Respondent, in Paragraph No. 74(i) and (v) of his written statement, has

stated that he was not made aware of the orders of the Court after September 23, 2010, until January 2012, more specifically 16.01.2012, there is, however, no specific denial with regard to the Attorney-General's statement made before the Court on 16.01.2012. We may mention that when the learned counsel for the Respondent during submissions stated that the Respondent was not aware of the orders of the Court, the then Attorney-General, Moulvi Anwar-ul-Haq intervened that he had conveyed all the relevant orders to the Prime Minister. Perhaps, that may have been the reason that before arguments could be addressed by the Attorney-General, he was replaced. We have no doubt that the Respondent was made aware of the order of 16.01.2012. Be that as it may, on his appearance in response to the show cause notice, he still expressed his unwillingness to obey the Court's orders.

66. Coming to the evidence in support of the charge, the Attorney-General for Pakistan, acting as prosecutor, tendered in evidence attested copies of the two judgments in *DR. MOBASHIR HASSAN*'s case (ibid) and the orders of this Court for the implementation of Paragraph No. 178 of the original judgment. The learned counsel for the Respondent did not raise any objection when these documents were tendered in evidence under Article 88 of the Qanun-e-Shahadat Order, 1984. The only defence witness, Ms. Nargis Sethi, the then Principal Secretary to the

Prime Minister, mainly referred to the schedule of the Prime Minister, with a view to persuade the Court that the Respondent's busy schedule does not allow him to examine in detail the summaries placed before him. We have already observed that this was not a routine Summary and that as a matter of fact, the Prime Minister did apply his mind as, not once but twice, he consciously decided against the implementation. The witness further stated that when the Summary is returned, the Minister concerned is obliged to inform the Prime Minister of further development. We have, however, already held that the option exercised by the Prime Minister in the first Summary amounted to non-implementation of the judgment; the observation of the Prime Minister that the Law Ministry had not given any definite opinion is inconsistent with his direction to the Ministry to continue with its stand, which amounts to saying that the judgment being not implementable shall not be implemented.

67. The learned counsel for the Respondent submitted that the prosecution had failed to establish the *mens rea* of the Respondent. The Respondent had been charged for *"willful"* disobedience. The *mens rea* required for such charge, is the willfulness of the Respondent. This is amply demonstrated by the conduct of the Respondent, who being aware of the direction of this Court, at least, from the time the first Summary was presented to him and being Chief Executive of the Federation was the ultimate authority

to formally carry out the orders of the Court, which he persistently declined. His clear direction in the second Summary presented to him, as discussed above, and his categorical stand before us upon commencement of the contempt proceedings when the Respondent appeared in response to the show cause notice establishes beyond reasonable doubt that the Respondent willfully flouted, and continues to flout, the orders of this Court. As regards the second ingredient of the charge, Rules 5(1) and (2) of the Rule of Business and Article 90 of the Constitution, which were mentioned in the first Summary, the Respondent had the final authority in the matter. This, as observed above, was also not disputed by the learned counsel for the Respondent. It is now admitted, and is proved on record, that it was the Respondent who took the ultimate decision. With authority comes the duty to exercise it whenever required by a lawful order. The Respondent failed to obey a lawful order, which he was constitutionally bound to obey.

68. After finding the factual allegations against the accused to have been established beyond reasonable doubt, we now advert to some legal aspects regarding his guilt and punishment. We note in this context that key words used in the Charge were *"willfully flouted"*, *"disregarded"* and *"disobeyed"* which find a specific mention not only in Section 2(a) of the Contempt of Court Ordinance (V of 2003) defining *"civil contempt"* but also in

Section 3 of the said Ordinance defining *"Contempt of Court"*. The said Ordinance V of 2003 derives its authority from Article 204(3) of the Constitution, Article 204(2) of the Constitution itself empowers this Court to punish a person for committing *"Contempt of Court"* and the above mentioned words used in the Charge framed against the accused also stand sufficiently covered by the provisions of Article 204(2) of the Constitution. It is pertinent to mention here that Section 221, Cr.P.C. dealing with Charge and its forms clarifies that a Charge is to state the offence and if the offence with which an accused is charged is given a specific name by the relevant law then the offence may be described in the Charge *"by that name only".* According to Section 221, Cr.P.C. *"If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged"*. It is further provided in Section 221, Cr.P.C. that *"The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge".* In the case in hand not only the name of the offence, i.e. contempt of court had been specified in the Charge framed against the accused but even the relevant Constitutional and legal provisions defining contempt of court had been mentioned in the Charge framed. According to Section 221(5), Cr.P.C. the fact that the Charge is made in the terms noted above *"is equivalent to a statement that every legal condition*

required by law to constitute the offence charged was fulfilled in the particular case".

69. We further note that even if a Charge framed against an accused for committing contempt of court is established before a court still for finding him guilty or for punishing him, even after establishing of his culpability, the provisions of Section 18 of the Contempt of Court Ordinance (V of 2003) require the following satisfactions to be recorded by the Court:

> *"18.* ***Substantial detriment.-*** *(1) No person shall be found guilty of contempt of court, or punished accordingly, unless the court is satisfied that the contempt is one* ***which is substantially detrimental to the administration of justice*** *or scandalizes the court or otherwise tends to bring the court or Judge of the court into hatred or* ***ridicule****.*
>
> *(2) In the event of a person being found not guilty of contempt by reason of sub-section (1) the court may pass an order deprecating the conduct, or actions, of the person accused of having committed contempt."*

70. These provisions of the Contempt of Court Ordinance clearly show that despite his culpability having been established, a Court seized of a matter of contempt is not to hold the offender guilty or punish him for every trivial contempt committed and it is only a grave contempt having the effects mentioned in Section 18(1) that may be visited

with a finding of guilt or punishment. It is important to note in this context that the satisfaction of the Court mentioned in section 18(1) regarding gravity of the contempt is to be adverted to by it after commission of the contempt is duly established and such satisfaction of the Court is neither an ingredient of the offence nor a fact to be proved through evidence. In our considered opinion such satisfaction is purely that of the Court concerned keeping in view the nature of the contempt found to have been committed, its potential regarding detrimental effect upon administration of justice or scandalizing the Court and its tendency to bring the Court or the Judge into hatred or ridicule. At such stage the contempt of Court attributed to the offender already stands established and assessment of the tendency of the contempt to possibly create the above mentioned detrimental effects is thereafter to be undertaken by the Court for its own satisfaction in order to decide whether to convict or punish the offender or not and such satisfaction based upon judicially assessed possible effects is not to be based upon proofs or evidence to be produced during the trial. However, if the Court is not satisfied about the above mentioned detrimental effects then despite the contempt having been established and proved, it may not convict or punish the offender and may resort to merely deprecating the conduct or actions of the accused in terms of Section 18(2) of the Ordinance. We may also add that the satisfactions of the Court contemplated by Section 18(1) of

the Ordinance are the minimum thresholds to be crossed and there is no limit upon a Court regarding not recording satisfaction in respect of any graver detriment or tendency made possible by the conduct or actions of an offender. In the case in hand the accused is the highest Executive functionary of the State of Pakistan and he has willfully, deliberately and persistently defied a clear direction of the highest Court of the country. We are, therefore, fully satisfied that such clear and persistent defiance at such a high level constitutes contempt which is substantially detrimental to the administration of justice and tends not only to bring this Court but also brings the judiciary of this country into ridicule. After all, if orders or directions of the highest court of the country are defied by the highest Executive of the country then others in the country may also feel tempted to follow the example leading to a collapse or paralysis of administration of justice besides creating an atmosphere wherein judicial authority and verdicts are laughed at and ridiculed.

71. It may be mentioned that the learned counsel for the Respondent in his written submissions brought on the record at the end of his oral arguments had specifically adverted to the provisions of section 18 of the Contempt of Court Ordinance and, thus, he was fully aware of the applicability and implications of the said legal provision *vis-à-vis* the case against him. It is, however, another thing that throughout his oral arguments and submissions the learned

counsel for the accused had failed to utter even a single word on the subject. The Respondent was put on notice through Option No.2 in the order dated 10.01.2012 (Ex.P22) of the possible consequences of non-compliance of this Court's direction and the relevant portion of that order reads:

> *"5. This brings us to the actions we may take against willful disobedience to and non-compliance of some parts of the judgment rendered and some of the directions issued by this Court in the case of Dr. Mobashir Hassan (supra). This Court has inter alia the following options available with it in this regard:*
>
> ---
> ---
>
> *.....**It may not be lost sight of that, apart from the other consequences, by virtue of the provisions of clauses (g) and (h) of Article 63(1) read with Article 113 of the Constitution a possible conviction on such a charge may entail a disqualification from being elected or chosen as, and from being, a member of Majlis-e-Shoora (Parliament) or a Provincial Assembly for at least a period of five years."***

72. For the above reasons we convicted and sentenced the Respondent by short order on 26.04.2012, as follows:

> *"For reasons to be recorded later, the accused Syed Yousaf Raza Gillani, Prime Minister of Pakistan/Chief Executive of the Federation, is found guilty of and convicted for contempt of court under Article 204(2) of the Constitution of Islamic Republic of Pakistan, 1973 read with section 3 of the Contempt of Court Ordinance (Ordinance V of 2003) for willful flouting, disregard and disobedience of this Court's direction contained in paragraph No. 178 of the judgment delivered in the case of* ***Dr. Mobashir Hassan*** *v.* ***Federation of Pakistan*** *(PLD 2010 SC 265) after our satisfaction that the contempt committed by him is substantially detrimental to the administration of justice and tends to bring this Court and the judiciary of this country into ridicule.*
>
> *2. As regards the sentence to be passed against the convict we note that*

the findings and the conviction for contempt of court recorded above are likely to entail some serious consequences in terms of Article 63(1) (g) of the Constitution which may be treated as mitigating factors towards the sentence to be passed against him. He is, therefore, punished under section 5 of the Contempt of Court Ordinance (Ordinance V of 2003) with imprisonment till the rising of the Court today."

Judge

Judge

Judge

Judge

Judge

Judge

Judge

ISLAMABAD
26th April, 2012
Shirazi & Mudassar.

"NOT APPROVED FOR REPORTING."