Form No: HCJD/C-121.

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 4340 of 2022

Anwar Mansoor Khan

Vs

Special Court, Islamabad through its Registrar, etc.

S. No. of order/ proceedings	Date of order/ proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	14-11-2024.	

In exercising jurisdiction under Section 152 of the Code of Civil Procedure, 1908, I find it necessary to correct an error in Paragraph 12 of the judgment rendered in the afore-titled petition, dated 30.10.2024. The word "comedy" in the 15th line of Paragraph 12 shall be read as "comity". This order will be considered an integral part of the judgment, dated 30.10.2024.

(BABAR SATTAR)
JUDGE

Saeed.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 4340/2022

Anwar Mansoor Khan
vs.
Special Court, Islamabad, through its Registrar

PETITIONER BY:	Barrister Umaimah A. Khan and Mr. Saqlain Haider, Advocates, alongwith petitioner.
RESPONDENT BY:	Malik Abdur Rehman, State Counsel.
DATE OF DECISION:	30.10.2024

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BABAR SATTAR, J.- The petitioner is seeking the expungement of certain remarks made in relation to him while he was representing General Retired Parvez Musharraf before the Special Court constituted under the Criminal Law Amendment (Special Court) Act, 1976 **("Special Court Act")**.

2. In terms of background, the petition was originally filed in 2014 and by order dated 16.04.2014 this Court had held that under Section 12(3) of the Special Court Act, a party aggrieved by final judgment of the Special Court would need to prefer an appeal to the Supreme Court. And as the impugned order amounted to a final judgment in respect of the petitioner, the appropriate remedy would lie before the Supreme Court. The petitioner then impugned the said order before the Supreme Court through CP No.2490 of 2014, which by order dated 26.04.2022 held that the remarks made in relation to the conduct of the petitioner did not relate to the merits of the case before the Special Court, and consequently the remedy under

Section 12(3) of the Special Court Act was not available to the petitioner. Consequently, order dated 16.04.2014 passed by this Court was set-aside and the matter was returned to the High Court for adjudication of the substantive grievance raised in the petition in accordance with law.

3. The learned counsel for the petitioner submitted that the facts, as narrated in the impugned order passed by the Special Court dated 27.03.2014, were incorrect. During the hearing, the petitioner had objected to the court affording an audience to the learned Prosecutor. In the process, the learned President of the Special Court got in a fluster and declared that he would not hear the case and would recuse himself. However, when the written order was issued, it included disparaging remarks about the petitioner and made no order as to recusal of the learned President of the Special Court. She submitted that the petitioner was a senior counsel with forty-five years of experience at the Bar. He had remained the Attorney General for Pakistan twice, had been the longest serving Advocate General for Sindh and the disparaging remarks undermined his rights guaranteed by Article 9 of the Constitution. As the remarks affected the petitioner's right to livelihood and were in breach of his right to profession guaranteed by Article 18 of the Constitution. She further submitted that the remarks had been passed without issuing any notice to the petitioner and were therefore in breach of Article 10A of the Constitution as well.

4. The learned counsel for the petitioner submitted that it was held by the Supreme Court in **Malik Feroz Khan Noon vs.**

The State (PLD 1958 SC (Pak) 333) that objectionable remarks ought not be made against a person who is neither a party nor a witness in the case. It was a rule of fair play that when a judge decided to condemn a person, such person must be given an opportunity to explain the condemnatory facts and to remove the judge's suspicion about his conduct as the remedy of defamation was not available to such person. She further took the Court through the evolution of the law on the question of when a judge is to be treated as functus officio read with the definition of person as defined under Article 199(5) of the Constitution, starting with **Mian Jamal Shah vs. Member Election Commission (PLD 1966 SC 01)** all the way to **Gul Tez Khan Marwat vs. Registrar Peshawar High Court (PLD 2021 SC 391)**. It was submitted that in view of the law as enumerated in **Mian Jamal Shah, Abrar Hassan vs Government Of Pakistan and others (PLD 1976 SC 315)**, **Muhammad Ikram Chaudhry vs. Federation Of Pakistan and others (PLD 1998 SC 103)**, **Malik ASAD ALI and others vs. Federation Of Pakistan, through Secretary Law, Justice and Parliamentary Affairs (PLD 1998 SC 161)**, **Muhammad Iqbal and others vs. Lahore High Court through Registrar and others (2010 SCMR 632)**, **Ch. Muhammad Akram vs. Registrar, Islamabad High Court and others (PLD 2016 SC 961)**, **Amjad Ali vs. Federal Shariat Court through Registrar and others (2019 PLC(CS)N 91)** and **Gul Taiz Khan Marwat vs. The Registrar, Peshawar High Court, Peshawar and others (PLD 2021 SC 391)**, a judge acting as persona designata was amenable to the jurisdiction of the High

Court under Article 199 of the Constitution falling within the scope of person as defined in Article 199(5) of the Constitution. She submitted that judges comprising the Special Court were persona designata, who did not fall in the exclusion provided under Article 199(5) of the Constitution. Their orders could be reviewed by the High Court under Article 199 of the Constitution and a writ of certiorari could be issued where the order was found to be illegal.

5. On Court query the learned counsel for the petitioner submitted that there was an established tradition of judges exhibiting comity amongst peers and not reviewing orders passed by other judges. However, an exception to this judicial convention was where an order had breached the fundamental rights of an individual in which case upholding the fundamental rights would trump considerations of comity amongst judges.

6. The learned State Counsel submitted that the Special Court was constituted under Section 4 of the Special Court Act and comprised three persons each of whom was to be a judge of the High Court. He submitted that as the Special Court Act itself determined the composition of the Special Court as comprising judges of the High Court, it could not be argued that while exercising authority as part of the Special Court, such judges of the High Court were persona designata. He further submitted that there was no factual basis for this Court to expunge the observations made by the Special Court. The petitioner was disputing the narration of events, as recorded by the Special Court, which order was signed by all three judges comprising the

Special Court. The presumption of truth attached to the facts, as narrated in the impugned order, and this Court could not enter into a factual inquiry to determine whether or not the facts, as narrated in the impugned order, were correct, as that would require a trial of facts, which this Court could not undertake in its constitutional jurisdiction.

7. The petitioner is seeking this Court to judicially review the legality of the impugned order under Article 199(1)(A)(2) of the Constitution. The impugned order was passed by the Special Court duly constituted in terms of Section 4 of the Special Court Act. The question of legality of composition of the Special Court was challenged before the Supreme Court and such challenges were found to be without merit. The Supreme Court most recently in **Taufeeq Asif vs. General Retired Pervez Musharraf (2024 SCMR 63)** read with **Taufeeq Asif vs. General Retired Pervez Musharraf (C.P. No.3979 of 2020)** by judgment dated 10.01.2024 endorsed the legality of composition of the Special Court and the judgment rendered in the case of **General Retired Pervez Musharraf**. The only question before the Court is whether certain observations made by the Special Court in order dated 27.03.2014 are liable to be judicially reviewed for having breached the fundamental rights of the petitioner.

8. The Special Court was constituted under Section 4(1) of the Special Court Act, which states that, *"for the trial any of the offences specified in subsection (1) of Section 3, the Federal Government may, by notification in the official gazette, set up*

one or more Special Courts composed of three persons, each of whom is a judge of a High Court, and shall nominate one of the said persons to be the President of the Special Court." Also relevant for our purposes is Section 12(1) of the Special Court Act, which states that, *"no court shall entertain any plea as to the jurisdiction of the Special Court or as to the legality or propriety of anything done or purported to be done by the Special Court or order the release under Section 491 or Section 498 of the Court or any other law of any accused person in a case triable by the Special Court for so long as the court is seized of the case."*

9. Section 12(1) of the Special Court Act is in the nature of an ouster clause. The second principle with regard to interpreting ouster clauses is that in face of such ouster clause, the High Court has limited jurisdiction to exercise judicial review in cases where the order is found to be coram non judice, without jurisdiction or *malafide*. In the instant case, the Special Court was not coram non judice, as has already been mentioned about, as its composition and establishment was challenged for the Supreme Court, which challenges did not succeed. It has also not been argued before this Court that the impugned order suffers from *malafide*. It is settled law that any allegation of *malafide* has to be specifically made and proven. The only argument therefore before this Court is that the impugned order is without jurisdiction as it has been passed in breach of the right of the petitioner to due process and fair trial guaranteed by Article 10A of the Constitution.

10. The first question that arises for the Court is whether High Court Judges acting as part of the Special Court as provided in Section 4 of the Special Court Act are persona designata and their orders can be reviewed by the High Court in exercise of its powers under Article 199 of the Constitution.

11. The learned counsel for the petitioner had very ably assisted the Court with regard to the evolution of the manner in which the doctrine of persona designata is to be applied in the actions of Judges of the High Court. In the interest of economy, the entire case law need not be summarized afresh as a review of such case law was undertaken by the Supreme Court in **Gul Taiz Khan Marwat**. The basic question before the Court was whether the Executive, Administrative or Consultative actions of the Chief Justices or Judges of the High Court were amenable to the constitutional jurisdiction of the High Court under Article 199 of the Constitution. The questions had arisen as the Supreme Court had previously held in **Ch. Muhammad Akram vs. Registrar Islamabad High Court (PLD 2016 SC 961)** that an order of a judge of the High Court while exercising executive, administrative and consultative functions was amenable to the constitutional jurisdiction of the High Court. The Supreme Court overruled the law previously laid down in **Chaudhary Muhammad Akram** by upholding that it was not good law. The Supreme Court held that while determining whether judges exercising administrative powers in terms of Section Article 208 of the Constitution were acting as persona designata, a but-for test needed to be applied to determine *"whether or not a particular act or function carried out by a judge is immune to*

challenge under the writ jurisdiction under Article 199." The Supreme Court found that the powers under Article 208 of the Constitution were essential for the existence of superior courts and but for being judges of superior courts, the administrative, executive or consultative orders could not be passed by such judges and consequently *"such acts or orders could in our opinion be protected by Article 199(5) of the Constitution and thereby be immune to challenge under the writ jurisdiction of the High Court."*

12. The learned counsel for the petitioner laid much emphasized on the law laid down by the Supreme Court in **Mian Jamal Shah** where it ruled that judges acting as part of the Election Commission were not acting as judges of the High Court, but were persona designata. In **Mian Jamal Shah** it was held by the Supreme Court that a decision of a member of the Election Tribunal who happened to be a judge of the High Court was not a judgment of the High Court as the member in question was persona designata and did not act as a judge of the High Court while sitting as Election Tribunal. However, while holding so, it was also observed that a High Court exercising judicial review in its constitutional jurisdiction to issue an order to a member of the Tribunal, who was also a judge of the High Court, may be ludicrous and against the weighty consideration of maintaining a high degree of comedy amongst judges of superior courts. One of the reasons that prevailed with the Supreme Court in **Mian Jamal Shah** was that the questions in the case related to the counting of votes, which function ordinarily fell outside the judicial process within our constitutional scheme. It

was in such context that the Supreme Court came to a conclusion that the authority exercised by a member of the Election Tribunal, even when such member was a sitting judge of the High Court, was while acting as persona designata, and the High Court retained its authority of exercising judicial review in relation to an order passed by the judge in his capacity as member of the Election Tribunal.

13. The same functional argument cannot be made in relation to a Special Court established under the Special Court Act. The Special Court established under the Special Court Act is for the express purpose of trying offences punishable under certain provisions of the Pakistan Penal Code, 1860, and offences punishable under the High Treason (Punishment) Act, 1973. The trial of offences falls squarely within the domain of the judicature within our constitutional scheme of separation of powers in terms of Article 175 of the Constitution. The learned counsel for the petitioner is correct in pointing out that notwithstanding the fact that the judges comprising the Special Court must be serving judges of the High Court, while acting as judges of the Special Court, they do not act as a High Court and are consequently not excluded from the definition of person as provided under Article 199(5) of the Constitution. Notwithstanding this, the dicta from **Mian Jamal Shah** with regard to the ludicrousness of a High Court (which may comprise one judge of the High Court, as in the instant case) issuing directions to three serving judges of the High Court must be borne in mind while determining the threshold for a High Court assuming jurisdiction under Article 199(1)(A)(2) of the

Constitution to judicially review an act done by the Special Court comprising three serving judges of the High Courts. In such circumstance, the threshold for establishing the need for interference would be high and the High Court's approach to exercising judicial review powers would be deferential.

14. Once we conclude that judges of the Special Court do not act as judges of the High Court and therefore fall within the definition of person in terms of Article 199(5) of the Constitution, the question before the Court is whether notwithstanding the ouster clause in Section 12(1) of the Special Court Act, does the act of the Special Court suffer from such jurisdictional defect that it ought to be corrected in exercise of judicial review powers by this Court. The jurisdictional defect that has been pointed out in the instant case is that while holding in the impugned order dated 27.03.2014 that the petitioner behaved in a manner *"unbecoming of a counsel"* and *"did not demonstrate the level of decency towards the court which is expected from a senior counsel"*, the Special Court breached Article 10A of the Constitution and undermined the fundamental rights of the petitioner to fair trial and due process.

15. Article 10A of the Constitution states that, *"for the determination of his civil rights and obligations or in any criminal charge against him person shall be entitled to a fair trial and due process."* The impugned order neither determines the civil rights and obligations of the petitioner nor renders any decision with regard to a criminal charge against him. The impugned order records the observations of the court and the opinion formed on

the basis of the petitioner's conduct before the court during the proceedings on 27.03.2014. Had the Special Court determined that the conduct of the petitioner was such that it attracted exercise of contempt powers by the court or that the petitioner was liable to face disciplinary proceedings under the provisions of the Pakistan Legal Practitioners and Bar Council Rules, 1976, the said determination would constitute a penal action, for which there would be a need to issue notice to the petitioner to show-cause as to why such penal action may not be taken. The observations in the impugned order do not undermine any fundamental rights of the petitioner nor can be treated as observations in breach of his right to dignity guaranteed by Article 14 of the Constitution.

16. As an essential part of the administration of judicial proceedings, courts are required to ensure orderly conduct of the parties and counsels who appear before the court. A plain reading of the impugned order reflects that the court was disappointed with the behavior of the petitioner as a senior counsel appearing before the court and while deprecating such behavior, the three judges comprising the Special Court, who were senior serving judges of three different High Courts, observed that they found the petitioner's behavior unbecoming and expected him to exhibit a greater level of decency towards the Special Court while conducting himself. Such observations passed in a challenging case relating to a former dictator being tried for treason and overthrowing the Constitution appear to be meant to bring order to the proceedings and ensure maintenance of required decorum as the remarks that are

sought to be expunged were issued not in terms of imposing any penalties, but to record the displeasure of the court.

17. The argument that such remarks ought to have been passed only after issuing the petitioner's notice for purposes of article 10A of the Constitution or under any concept of upholding the petitioner's rights to natural justice is without merit. Given that there were no penalties inflicted on the petitioner and there was no determination of his civil rights, there was no occasion to issue a notice to him to show-cause why any penalties ought not be imposed or how his civil rights may be adjudged in a different fashion. The law cited at bar with regard to the preferred approach of courts to not pass strictures remains good law. However, the principles mentioned therein have no application to the instant case. It is not the petitioner's case that a stranger to the proceedings was condemned unheard. The petitioner was before the court and the observations in the impugned order relate to the petitioner's conduct as counsel to the accused, General Retired Pervez Musharraf, while arguing the matter in open court. While this Court has found that Article 10A of the Constitution has no application to the petitioner's case, the various exceptions to the right to be heard have been enumerated by the Supreme Court in the case of **Justice Khurshid Anwar Bhinder vs. Federation (PLD 2011 SC 197)**, which include *inter alia* circumstances where in the scheme of things, there is no requirement for a notice to be given. The petitioner’s case clearly falls within such exception as no unfairness can be attributed where in view of the conduct of a counsel before the Special Court, it recorded in its judicial order

its opinion of such conduct. The hands of a court cannot be tied up by requiring that in face of misbehavior by a party or a counsel, prior to recording what transpired in court, it must issue a notice to the misbehaving party or counsel. Where the misbehavior acquires a form that the court is minded to exercise its powers of contempt, the law does require that a notice be issued.

18. This Court therefore finds that the petitioner has failed to make out a case that the impugned order suffers from any illegality of a nature that renders the order illegal and without jurisdiction and ought to be corrected by this Court in its constitutional jurisdiction. The petition alleges that the Special Court in the impugned order has misstated facts. This Court has no factual basis to assume that the petitioner's version of facts constitutes the actual truth. And on the basis of an affidavit furnished by the petitioner, the Court ought to interfere with and expunge observations made by three serving judges of three High Courts, who at the relevant time comprised the Special Court constituted under Section 4 of the Special Court Act. This Court also finds that there are no fundamental rights of the petitioner at peril in the instant matter. It has been argued that the unflattering observations of the Special Court have undermined the petitioner's right to livelihood. The argument is without merit as the petitioner has remained a successful senior counsel running a busy practice and was also appointed the Attorney General for Pakistan in the year 2018 (i.e. after the impugned order was passed). The petitioner’s elevation to the office of the Attorney General for Pakistan is in itself a

manifestation of the fact that the impugned order and the observations made therein have had no impact on his right to livelihood or to practice his profession as guaranteed by Articles 9 and 18 of the Constitution.

19. This Court has also noted that some of the language used in the memo of the petition with regard to how the actions of at least one of the judges comprising the Special Court have been described may be more objectionable and unflattering than the observations of the Special Court in the impugned order. This Court will however take a lenient view and not dwell on this any further, in order not to embarrass the petitioner in recognition of the fact that he is a Senior Advocate of the Supreme Court, who has had the distinction of serving the country as its Attorney General, as pointed out by the learned counsel for the petitioner with emphasis during the hearing of the instant matter.

20. For the aforementioned reasons, this Court finds that the petition is without merit and is **dismissed**.

(BABAR SATTAR)
JUDGE

Approved for reporting.

A. Rahman Abbasi.