JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W.P. No. 4560 of 2023

Ch. Fawad Ahmed
Vs.
Election Commission of Pakistan and another

W.P. No. 1976 of 2024

Ch. Fawad Ahmed
Vs.
Federation of Pakistan and another

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Petitioner by : M/s Faisal Fareed, Tariq Khokhar, Ch. Fawad Ahmed and Bina Shahid Advocates.

Respondents by : Mr Imran Farooq and Raja Zamir ud Din Ahmed, AAGs.

Barrister Saman Mamoon for the Respondent No. 1/ECP.

Ms Saima Tariq Janjuah, Deputy Director (Law) ECP.

Mr. A. Raheem, S.O. (Litigation I) MOI.

Date of Hearing : **11.7.2024**.

SAMAN RAFAT IMTIAZ, J.-

1. This Judgment shall decide the above titled Writ Petitions, which involve common questions of law arising from similar facts.

2. The Petitioner [Chaudhary Fawad Ahmed] vide W.P. No. 4560 of 2023 has sought (i) setting aside of Orders dated 30.11.2023 **("Impugned Order I")** and 12.12.2023 **("Impugned Order II")** whereby the Respondent No. 1 [Election Commission of Pakistan **("ECP")**] ordered the contempt proceedings against the Petitioner to be conducted in Adyala Jail, Rawalpindi **("Adyala Jail")**; and (ii) directions to the ECP to proceed with the hearing in open court as conducted earlier in the premises of ECP and to the relevant authorities to produce the Petitioner on each date of hearing.

3. The Petitioner vide W.P. No. 1976 of 2023 has sought declaration that the Notifications No. F. No. 6/4/2023-Lit-1 dated 8.12.2023 **("Impugned Notification No. I")** and 20.12.2023 **("Impugned Notification No. II")** whereby the Respondent No. 1 [Federation of Pakistan through the Secretary, Ministry of Interior **("FOP")**] has issued directions to the concerned authorities to provide all administrative facilitation including security at all subsequent hearings to be conducted in Adyala Jail as per directions of the Respondent No. 2 [ECP] are void, illegal and unlawful and that all proceedings pursuant to the Impugned Notifications are illegal and of no effect.

4. As per the memoranda of Petitions the Petitioner is a law practitioner and member of the Supreme Court Bar Association of Pakistan. He was elected as Member, National Assembly of Pakistan from NA-97 (Jhelum) and after being chosen for the Federal Cabinet, served in the Ministries of Information and Broadcasting as well as Science and Technology in the erstwhile Pakistan Tehreek-e-Insaf government. The Petitioner has allegedly been targeted by his political opponents in order to keep him out of the elections held in 2024 by lodging false, frivolous, and unfounded cases against him in which he has been arrested merely to vex him and his family. The Petitioner was in the custody of the National Accountability Bureau on physical remand at the time of filing of W.P. No. 4560 of 2023. The Petitioner being under trial prisoner was being produced in various Courts. The contempt proceedings were initiated against the Petitioner for

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the alleged use of intemperate language and contemptuous remarks against the ECP during media talk.

5. During the proceedings of contempt the ECP issued the Impugned Order No. I ordering that the contempt matter against the Petitioner shall be conducted in Adyala Jail by the ECP as proceedings of similar matter of contempt against Imran Khan shall be conducted in Adyala Jail, Rawalpindi hence the Ministry of Interior was directed to notify the trial of the matter in Adyala Jail after fulfilling all the requisite legal formalities and proceedings for framing of charge against the Petitioner was ordered to be conducted on 13-12-2023 at Adyala Jail, Rawalpindi.

6. Thereafter, the ECP issued the Impugned Order No. II ordering that as similar matters are fixed for proceedings in Adyala Jail on the next date i.e. 13-12-2023 therefore such matter shall also be fixed along with other matters for submission of reply to show cause notice and for further proceedings at Adyala Jail, Rawalpindi while also allowing the Petitioner's lawyers along with clerks, mother and wife to attend the proceedings on the next date.

7. Subsequently, the FOP issued the Impugned Notifications pursuant to the Impugned Orders. Hence these Petitions.

8. The learned counsel for the ECP, at the very outset, challenged the maintainability of the instant Petition. In this regard, she submitted that the original Notice dated 19.8.2022 issued by the ECP to the Petitioner was challenged by the Petitioner before the Lahore High Court, Rawalpindi Bench in W.P. No. 2285 of 2022 while also seeking *inter alia* a declaration that Section 10 of the Elections Act, 2017 **("Elections Act")** is *ultra vires*. Thereafter, Show Cause Notice dated 13.9.2022 **("SCN I")** was issued which too was challenged by the Petitioner before the Lahore High Court, Rawalpindi Bench in W.P. No. 2605 of 2023 while also seeking declaration that Section 4 of the Elections Act is *ultra vires*. Both the said petitions were not pressed on 13.3.2023. However, subsequently

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the Petitioner filed W.P. No. 47883 of 2023 challenging not only the Notice dated 19.8.2022 and SCN I yet again but also Order dated 5.6.2023 passed by the ECP in the proceedings emanating from the Notice dated 19.8.2022 as well as the vires of Sections 4(2) and 10 of the Elections Act and Rule 4 of the Election Rules, 2017 **("Election Rules")**. W.P. No. 47883 of 2023 was dismissed for non-prosecution on 22.1.2024 but a restoration application was filed by the Petitioner on 23.1.2024 which is pending. The learned counsel for the ECP therefore argued that propriety demands that this Court restrain itself from exercising jurisdiction in the instant matters in view of the pendency of the restoration application in the writ petition filed before the Lahore High Court, Rawalpindi Bench. In this regard, she relied upon *Lieutenant General (R) Salahuddin Tirmizi versus Election Commission of Pakistan,* PLD 2008 SC 735, whereby it was held that propriety demanded that the subsequent order passed by the ECP in post remand proceedings should have also been challenged before the Islamabad High Court since an earlier order passed by the ECP was challenged before the Islamabad High Court. The learned counsel also cited *Muslim Commercial Bank Limited and another versus Momin Khan and others,* 2002 PLC (CS) 898. She confirmed that the Orders and Notifications impugned in the instant proceedings are not being challenged before any other High Court. However, she relied upon *Alam Dad Laleka versus Election Commission of Pakistan*, PLD 2020 Islamabad 20 whereby this Court while quoting *Salahuddin Tirmizi (Supra)* held that where a litigant challenged a show cause notice before a High Court of one province he cannot be permitted to challenge another order passed in the same proceedings before another High Court. She argued that since the Impugned Order I and Impugned Notification I have been passed in contempt proceedings arising out of Notice dated 19-08-2022 and SCN I, which have been challenged before the Lahore High Court, Rawalpindi Bench, propriety demands that this Court does not exercise jurisdiction in the matter. The learned counsel for ECP further contended that this Court will be required to interpret Section 10 of the Elections Act in order to

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consider the arguments of the Petitioner as to whether or not ECP is a Court and whether it is liable to fulfill the requirements of Section 352, Cr.P.C., whereas the vires of Section 10 of the Elections Act is under challenge by the Petitioner in W.P. 2285 of 2022 before the Lahore High Court, Rawalpindi Bench.

9. The learned Assistant Attorney General relied upon *Election Commission of Pakistan and others versus Pakistan Tehreek-e-Insaf and others*, PLD 2024 SC 267 and referred to Section 10, CPC to submit that a party cannot agitate the same matter which is directly or substantially at issue in a previously instituted case.

10. In response to the challenge to the maintainability of the instant petitions, the learned counsel for the Petitioner in W.P No. 4560 of 2023 emphasized that the Supreme Court of Pakistan in *Salahuddin Tirmizi* (*Supra)* concluded that both the orders passed by the Islamabad High Court as well as the Peshawar High Court were passed with lawful authority. Even otherwise, the learned counsel for the Petitioner submitted that the circumstances of the case of *Salahuddin Tirmizi* (*Supra)* are different from the instant case as in the said case an order passed by the ECP rejecting an application for a re-poll was challenged before this Court in writ petition wherein this Court remanded the matter to the ECP whereas what was challenged before the Peshawar High Court was an order passed by the ECP in post remand proceedings. The learned counsel for the Petitioner denied that the matter agitated before this Court is the same or substantially similar to the matter agitated in W.P. No. 47883 of 2023 before the Lahore High Court, Rawalpindi Bench and that even otherwise the said petition cannot be considered as pending since it has been dismissed vide the Order dated 22.1.2024 and has not yet been restored. In this regard, he referred to Order IX, Rules 8 and 9, C.P.C. to argue that a matter dismissed for non-prosecution cannot be revived till the order of dismissal has been set aside which has not yet happened in W.P. No. 47883 of 2023 as the restoration application is still pending. Moreover, he argued that the Lahore High

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Court, Rawalpindi Bench has not exercised jurisdiction in the matter as the matter has not been heard on merits. Whereas, the Petitioner has also challenged Impugned Order and Notification II arising from Show Cause Notice dated 13-6-2023 **("SCN II")**, which was challenged by the Petitioner before this court vide W.P. 2004 of 2023 that was dismissed and against which ICA No. 354 of 2023 has been filed which is pending. He therefore contended that the instant writ petitions challenging the Impugned Order and Impugned Notification II are maintainable as this Court has already exercised jurisdiction in SCN II, and in view thereof the Impugned Order I as well as the Impugned Notification I would naturally also be challenged before this Court.

11. On merits the learned counsel for the Petitioner referred to Section 9(4) which provides that while exercising the powers conferred on it by sub-section (1), the ECP shall be deemed to be an Election Tribunal to which an election petition has been presented and shall, notwithstanding anything contained in Chapter IX, regulate its own procedure. He pointed out that the ECP is not a Tribunal under Section 10 and that it is not a Court as without a Constitutional amendment in Article 175A, another High Court cannot be established vide statutory provisions. He highlighted that pursuant to Section 199 of the Elections Act the Cr.P.C. applies to, *inter alia*, the 'trial of an offence' where sufficient provision does not exist in the Elections Act. He therefore argued that the ECP was bound to follow the procedure prescribed in Section 342, Cr.P.C. and Section 3 of the Lahore High Court Rules for a jail trial, which the ECP failed to do. The learned counsel for the Petitioner drew the Court's attention to the Impugned Order I wherein it has been noted that since the contempt proceedings against Imran Khan are taking place in Adyala Jail, Rawalpindi therefore proceedings against the Petitioner shall also be conducted in Adyala Jail. He submitted that the Petitioner and Mr. Imran Khan have been issued different show cause notices. He referred to copies of SCNs issued to the Petitioner as well as the notice/show cause notices

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dated 19.8.2022 and 13.9.2022 issued to Mr. Imran Khan to highlight that the contempt allegedly committed by the Petitioner was on different dates and different venues. He also contended that the instant writ petitions have not become infructuous despite the Petitioner having been released on bail as charge against the Petitioner was framed inside Adyala Jail on 3-1-2024 which will stand vitiated only upon a declaration setting aside the Impugned Orders and Impugned Notifications as prayed for vide the instant petitions.

12. The learned counsel for the Petitioner in W.P No.1976 of 2024 argued that the Impugned Notifications have been issued in violation and derogation of the applicable laws.

13. The learned counsel for the ECP submitted that charge has been framed against the Petitioner in Adyala Jail pursuant to the Impugned Order and Notification I only whereas neither charge has been framed nor any further proceedings have been held pursuant to the Impugned Order and Notification II. As such she argued that the instant writ petitions to the extent of the Impugned Order and Notification II have become infructuous by virtue of the fact that the Petitioner is no longer in Adyala Jail. She submitted that to the extent that the writ petitions challenge the Impugned Order and Notification I the same are not maintainable due to the pendency of the restoration application in W.P No.47883 of 2023 before the Lahore High Court, Rawalpindi Bench. She pointed out that that the original prayer made vide W.P No.4560 of 2023 was only to proceed with the contempt case in open Court and not for setting aside the Impugned Orders. She argued that the amended prayer whereby setting aside of the Impugned Orders has also been prayed for even if allowed would be allowed from the date of amendment and not from the date of institution of W.P No.4560 of 2023 as no prayer for declaring them void *ab initio* has been made. Thus even if W.P No.4560 of 2023 is allowed, according to the ECP it will not have the effect of setting aside any order that may have been passed by ECP in Jail pursuant to the Impugned Order and Notification I prior to the

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date on which the prayer was amended as this Court does not have *suo moto* powers. She therefore argued that setting aside the Impugned Orders will not have the effect of vitiating the proceedings that may have taken place in Adyala Jail so far. She also referred to Section 10, CPC and submitted that while the same relief may not have been prayed for vide W.P No.4560 of 2023 filed in this Court as in W.P No.47883 of 2023 filed before the Lahore High Court, Rawalpindi Bench, however, the arguments submitted by the learned counsel for the Petitioner before this Court in these proceedings are substantially the same as arguments to be submitted before the Lahore High Court, Rawalpindi Bench in W.P No.47883 of 2023 if the same is restored. She argued that the contempt proceedings are *sui generis* and not criminal proceedings and therefore cannot be equated with 'trial of an offence' as used in Section 199 of the Elections Act which pertains to other offences under the said Act. As such she submitted that Criminal Procedure Code, 1898 **("Cr.P.C.")** has no application upon contempt proceedings conducted by ECP, who is empowered to regulate its own proceedings under Section 3 of the Elections Act. She further submitted that Section 352, Cr.P.C applies to a criminal Court, whereas ECP while conducting contempt proceedings acts as a High Court. Similarly Rule 3 of the Lahore High Court Rules and Orders does not apply to High Court or ECP. She also submitted that the proceedings before ECP are in any event not open to public and as such the Petitioner cannot claim that he has the right of public trial in respect of contempt proceedings. She submitted that the reason for proceeding with the contempt proceedings against the Petitioner in Adyala Jail was because similar proceedings against Mr. Imran Khan were taking place in Adyala and that contemptuous remarks by both the accused persons were made at a time when they were both members of the same political party.

14. With respect to W.P No.1976 of 2024, the learned counsel for ECP submitted that although the Petitioner has specifically prayed for a declaration therein that all proceedings pursuant to the Impugned

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Notifications are illegal and of no legal effect, the petition not only suffers from *laches* but is also hit by Order II, Rule 2, CPC as the relief claimed for arises from the same cause of action as alleged in W.P No.4560 of 2023, in which no such prayer was made and therefore such claim would be deemed relinquished.

15. While exercising their right of rebuttal, the learned counsels for the Petitioner in both the instant petitions submitted that Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 **("Constitution")** is to be read into every criminal charge. They relied upon *Naveed Akhtar vs. The State*, PLD 2021 SC 600 in this regard. They relied upon *The State vs. Khalid Masood, Regional Director Pakistan Narcotics Board, Lahore and 3 others,* PLD 1996 SC 42; *Talal Ahmed Chaudhary vs. the State*, 2019 SCMR 542; and *Contempt Proceedings against Imran Khan, Chairman Pakistan Tehreek-I-Insaf*, PLD 2014 SC 367 to assert that contempt proceedings are *quasi* criminal in nature. They argued that ECP does not enjoy unbridled authority. They drew the attention of the Court to the Impugned Orders and submitted that they do not refer to Sections 3 and 4 of the Elections Act and reliance thereupon is an afterthought. They also pointed out that while the Impugned Orders refer to legal formalities it is not specified as to which legal formalities.

16. I have heard the arguments of the learned counsel for the parties and have also perused the record.

Maintainability of Writ Petitions:

17. As held by the Supreme Court in the case of *Salahuddin Tirmizi* (*Supra)* it is proper to decide the question of jurisdiction of this Court in the first instance being a fundamental question. It is undisputed that in light of *Salahuddin Tirmizi* (*Supra)* this Court does possess jurisdiction in the instant matter given that the Impugned Orders under challenge in W.P. No. 4560 of 2023 were passed by ECP in connection with the affairs of the Federation within the territorial jurisdiction of this Court.

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18. The question posed by the arguments presented by both the sides is whether keeping in view the principles of propriety settled in the case of *Salahuddin Tirmizi* (*Supra)* this Court ought to restrain itself from exercising jurisdiction in view of the pendency of a restoration application filed by the Petitioner in W.P. No. 47883 of 2023 (which was dismissed by the Lahore High Court, Rawalpindi Bench for non-prosecution) wherein the Petitioner has challenged the SCN I from which the Impugned Order I arises. In this regard I rely upon *Ghulam Qadir vs. Sharimati Sadori Baie and 2 others,* 2011 YLR 2560 and *Abbas Ali and another vs. Asif Abbas and 3 others,* 2016 CLD 555 whereby it has been held that a restoration application by itself would not bring life into dead proceedings unless life is put into it by the court in the form of restoration.

19. Be that as it may, W.P. No. 47883 of 2023 was dismissed by the Lahore High Court, Rawalpindi Bench for non-prosecution on 24.1.2024 whereas the instant W.P. No. 4560 of 2023 was filed before this Court on 30.12.2023. Thus it transpires that the day when W.P. No. 4560 of 2023 was filed before this Court challenging the Impugned Orders, SCN I from which the Impugned Order I arose was under challenge before the Lahore High Court, Rawalpindi Bench.

20. Interestingly enough, SCN II from which the Impugned Order II arises had been challenged before this Court in W.P. No. 2004 of 2023 which was dismissed on 25.9.2023 against which an ICA was filed and is pending since 18.10.2023.

21. Going by the argument submitted on behalf of the ECP, Impugned Order and Notification I should have been challenged before the Lahore High Court, Rawalpindi Bench whereas the Impugned Order and Notification II should have been challenged before this Court.

22. However, let us consider whether the Impugned Orders and Notifications could be challenged by way of separate petitions before two different High Courts. The subject matter of both the Impugned Orders

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and Notifications is for the ECP to conduct trial of the alleged contempt against the Petitioner in Adyala Jail. The reason stated in the Impugned Order I for the jail trial is the contempt proceedings against Imran Khan to be conducted in Adyala Jail, Rawalpindi while the reason given in the Impugned Order II is similar matters fixed for proceedings in Adyala Jail. Thus the reason given in the subsequent Impugned Order II is the pendency of the proceedings in Adyala Jail pursuant to *inter alia* the Impugned Order I. The purported reasons for the jail trial in the Impugned Orders I and II are therefore inextricably linked with each other. The Petitioner has challenged both the Impugned Orders and Notifications on the same grounds.

23. In the case of *Muslim Commercial Bank Limited (Supra)*, the Supreme Court and in the case of *Mirpurkhas Sugar Mills Limited vs. Federation of Pakistan,* 2013 MLD 433 the Sindh High Court held that invoking the Constitutional jurisdiction of different High Courts on the same subject matter seeking the same relief on the same grounds or different grounds is not permissible. In view of the foregoing pronouncements, the Impugned Orders I and II could not be challenged in two different High Courts given that the subject matter as well as the relief prayed for would essentially be the same and the grounds identical. Therefore, to avoid the possibility of a conflict in judgment, the Petitioner was constrained to file one petition challenging both the Impugned Orders and Notifications. It is also not out of place to observe that conflicting judgments with regard to the Impugned Orders could have resulted in an absurd situation.

24. Had the Petitioner challenged both the Impugned Orders and Notifications before the Lahore High Court, Rawalpindi Bench it would have invited the Respondents' objection to the jurisdiction of the Lahore High Court, Rawalpindi Bench on exactly the same ground as raised before this Court by submitting that SCN II from which the Impugned Order and Notification II arose was heard and dismissed by this Court which is also

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seized of ICA No. 354 of 2023 against the Judgment dated 25.9.2023 passed in W.P. No. 2004 of 2023. Since SCNs I and II were both challenged before two different High Courts, no matter which High Court the Petitioner approached to challenge the Impugned Orders and Notifications, the ECP would object to the jurisdiction given the pendency of the writ challenging the other SCN in the other High Court. However, the Petitioner cannot be left remediless in such circumstances.

25. Moreover, the writ petition filed before the Lahore High Court, Rawalpindi Bench to challenge SCN I has been dismissed for non-prosecution and the restoration application has not yet been decided. Although the dismissal happened after the filing of the instant petition, this Court can take into consideration subsequent events for the purpose of giving complete and effective relief in a case[1]. As such, I hold that the instant writ petitions are maintainable.

Whether the Writs have become Infructuous as the Petitioner is no longer in Jail?

26. The Petitioner filed W.P. No. 4560 of 2023 seeking setting aside of the Impugned Orders and for directions to proceed with the holding of the proceedings at the ECP premises on 30.12.2023 while the charge against the Petitioner pursuant to Impugned Order I was framed in Adyala Jail on 3-1-2024. Given that the charge pursuant to Impugned Order I was framed in Adyala Jail during pendency of W.P. No. 4560 of 2023, the same has not become infructuous as the determination as to whether or not the Impugned Order I is liable to be set aside will impact the charge that was framed in jail.

27. The ECP argued that setting aside the Impugned Order I will not have the effect of setting aside the charge framed in jail pursuant to the Impugned Order I. In this regard, she highlighted that the initial prayer was not for setting aside of the Impugned Orders rather was only for

[1] *Imran Ahmed Khan Niazi vs. Federation of Pakistan and others,* PLD 2024 Islamabad 155.

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direction to proceed in open court. The Petitioner sought setting aside of the Impugned Orders by seeking amendment in the prayer clause of the W.P. 4560 of 2023 on 24.1.2024 which was allowed by this Court on 02-02-2024 whereas charge had already been framed on 03.1.2024. The learned counsel for the ECP argued that the Petitioner has not prayed for declaration that the Impugned Order I is void *ab initio* and as such setting aside of the Impugned Orders would take effect from the date of amendment in prayer and not from the date of institution of the writ petition.

28. This argument is misconceived in view of *Mst. Barkat Bibi vs. Khushi Muhammad and others,* 1994 SCMR 2240 wherein it was held that once an amendment is granted it relates back to the date when the suit was filed. This dictum has been consistently applied by the Superior Courts.[2] Thus, in case the Impugned Order I is set aside, it will be set aside from the date of institution of W.P. No. 4560 of 2023 in which case the proceedings held pursuant to the Impugned Order I will necessarily have to fall to the ground.[3]

29. Insofar as the Impugned Order and Notifications II are concerned, neither charge has been framed against the Petitioner nor any other proceedings have been held in Adyala Jail pursuant thereto whereas the Petitioner has been released from Jail on bail during pendency of the instant matters hence the ECP's claim that the instant writs have become infructuous. However, the ECP has not placed before this Court any material for me to conclude that the Impugned Orders and Notifications II have been withdrawn. Thus, the possibility that the ECP may resume hearings in Adyala Jail pursuant to the Impugned Orders and Notifications

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[2] *Fazal ur Rehman and 2 others vs. Begum Sughra Haque*, 2000 MLD 562; *Mst. Bakht Bibi vs. Khushi Muhammad and others,* 1994 SCMR 2240; *Sabir Ali vs. Mst. Zubaida Bibi,*1993 MLD 321; and *Secretary to Government (West Pakistan) Now N.W.F.P. Department of Agriculture and Forests, Peshawar and 4 others,* PLD 1978 SC 242.

[3] *Vice-Chancellor Agriculture University, Peshawar and others vs. Muhammad Shafiq and other*, 2024 SCMR 527.

II in the event that the Petitioner is again incarcerated in Adyala Jail cannot be ruled out in which case it is imperative to determine their legality.

30. Moreover, the ECP has argued that it is free to regulate its procedure and as such can hold the contempt proceedings at any venue of its choosing. This argument has been dealt with later in the instant judgment. Suffice it to say at this point that in such case the fact that the Petitioner is no longer in jail at the moment would by itself have no bearing on the Impugned Orders and Notifications unless they are withdrawn. Therefore, in my opinion the writs have not become infructuous.

Application of Section 352, Cr.P.C. and Rule 3 of the Lahore High Court Rules on contempt proceedings conducted by the ECP:

31. In *Shahid Orakzai vs. Pakistan Muslim League (Nawaz Group) and 8 others,* 2000 SCMR 1969 and in *Suo Motu Contempt Proceedings initiated against Mr. Daniyal Aziz, Federal Minister,* PLD 2018 SC 738 the Supreme Court of Pakistan held that contempt of court proceedings are not *stricto sensu* a criminal trial under Cr.P.C. but are *sui generis* in nature partaking some of the elements of both civil and criminal proceedings but constituting neither. In *Muhammad Ibrahim and others vs. Syed Ahmad and others,* PLD 2000 SC 71 the Supreme Court held that Superior Courts are not bound by the provisions of the Civil Procedure Code or the Cr.P.C. or by technicalities of ordinary civil or criminal proceedings in dealing with a contempt matters. Thus it is clear that the provisions of Cr.P.C. are not strictly applicable upon contempt proceedings conducted by Superior Courts.

32. That being settled, nevertheless it is important to appreciate the historical and statutory reasons for why the provisions of Cr.P.C. are not applicable upon contempt proceedings conducted by superior courts in order to determine whether they are applicable upon contempt proceedings conducted by the ECP or not. To this end, I will refer to the judgment rendered by the Supreme Court of India in *Sukhdev Singh vs. Honourable*

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C.J.,S. Teja Singh and the Honourable Judge of the Pepsu High Court at Patiala, AIR 1954 SC 186 wherein the applicant argued that contempt by virtue of being an offence punishable in India under the Contempt of Courts Act, 1952 falls within the definition of *'offence'* given in the Criminal Procedure Code and as such is triable thereunder. The Supreme Court of India disagreed with the proposition by referring to Section 1(2) of the Criminal Procedure Code which expressly excludes special jurisdiction from its scope and held that the power of the High Court to punish for contempt is a special jurisdiction inherent in all Courts of Record and as such excluded from the Code of Criminal Procedure. In order to support the proposition that it is a special jurisdiction, the judgment refers to past precedent whereby the origin of the power to punish for contempt in the case of the Calcutta, Bombay and Madras High Courts was traced to the Common Law of England. The Government of India Act, 1915 by way of Section 106 continued to all High Courts then in existence the same jurisdiction, power, and authority as they had at the commencement of that Act and Section 113 empowered the establishment of new High Courts by Letters Patent with authority to vest in them the same jurisdiction powers and authority as are vested in or may be conferred on any High Court existing at the commencement of the said Act. Keeping that in view, the judgment observes that the Lahore High Court was established by Letters Patent in 1919 and was duly constituted a Court of Record. A Special Bench of the Lahore High Court punished contempt of itself in the year 1925 in the matter of *Habib son of Sadullah Khan,* AIR 1926 Lahore 1. The judgment rendered therein records that no objection has been taken to the jurisdiction of such court and as such discussion at length is unnecessary however the Full Bench observed that the authorities on the subject have been carefully examined based on which the Court was satisfied that as a Court of Record it had the jurisdiction to deal summarily with contempt.

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33. After discussing the foregoing history, the judgment rendered in *Sukhdev Singh (Supra)* discusses the Contempt of Courts Act, 1926 and refers to its heading as well as its preamble to hold that the said Act recognized an *existing* jurisdiction in all Letters Patent High Court to punish for contempt [as opposed to creating one]. The only doubt with which the Contempt of Courts Act, 1926 deals is the doubt whether a High Court could punish for contempt of a court subordinate to it and removes such doubt. Thus the judgment holds that the power to punish for contempt is inherent in the Letters Patent High Courts by virtue of being Courts of Record. It further notes that in 1927 another Full Bench of the Lahore High Court consisting of five Judges re-examined the position in the matter of *Muslim Outlook, Lahore,* AIR 1927 Lah 610 and reaffirmed their earlier decision in *Habib (Supra)* and held that this jurisdiction is inherent in every High Court. In 1942 the Lahore High Court examined the position in a Full Bench for the third time and reached the same conclusion. Thus, the Supreme Court of India in *Sukhdev Singh* held that the power of contempt is an *inherent* power in all Letters Patent High Courts by virtue of being Courts of Record.

34. Further whether such power conferred in 1950 by the Constitution of India constituted a fresh power or continuation of an existing power the jurisdiction was held to be a special one and therefore outside the purview of Cr.P.C. The Supreme Court of India also considered the Contempt of Court Act of 1952 which repealed the Contempt of Court Act, 1926 and observed that it assumes, as the old Act, the existence of a right to punish for contempt in every High Court as opposed to creating one. It was also held that since the Constitution vests the right to punish for contempt in every High Court, no Act of a Legislature can take away that jurisdiction and confer it afresh by virtue of its own authority.

35. The Supreme Court of India also reflected upon the wisdom behind not applying the Criminal Procedure Code in respect of the exercise of the power to punish contempt by High Courts by observing that it is apparent

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that the Criminal Procedure Code cannot be called in aid in such cases as otherwise given the maximum punishment that can be imposed for contempt it would be triable by a Magistrate and not by a High Court. Thus it was held that the Code of Criminal Procedure does not apply in matters of contempt triable by a High Court. The High Court can deal with it summarily and adopt its own procedure.

36. Let us understand what a Court of Record is. In *Crown vs. Abdur Rahman,* PLD 1950 Baghdad-ul-Jadid 36 the court observed that a Court of Record according to Blackstone is that *"where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony; which rolls are called a Records of Courts and are of such high and super-eminent authority that their truth is not to be called in question. All Courts of Record are the King's Courts in right of his Crown and Royal dignity and, therefore, no other Court had authority to fine or imprison; so that the very erection of a new jurisdiction with the power of fine or imprisonment makes it instantly a Court of Record".* The judgment holds that it is on this ground that all the superior Courts in England are Courts of Record and possess the inherent powers from the earliest times to commit a person for contempt by a summary process and that the High Courts in India exercise the inherent jurisdiction to punish their contempt as Courts of Record as they have been so created by the Letters Patent.

37. In short, the power to deal with contempt of the superior courts exists in England since time immemorial. The High Courts in India exercised similar powers as Courts of Record under their Letters Patent[4]. The Letters Patent constituting the High Court of Judicature at Lahore for the Provinces of the Punjab and Delhi dated 21-3-1919 ordained it to be a Court of Record. By way of the High Court of West Pakistan (Establishment) Order, 1955 the High Court of Judicature for the Province of West Pakistan was established and the High Court of Judicature at Lahore, the Chief Court of Sindh, the Judicial Commissioner, Court in the

[4] *Crown (Supra)*

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North-West Frontier Province and Baluchistan ceased to exist. Section 9 of the High Court of West Pakistan (Establishment) Order, 1955 applied the Letters Patent constituting the High Court of Judicature at Lahore for the Provinces of the Punjab and Delhi dated 21-3-1919 to the High Court of Judicature for the Province of West Pakistan. In 1970 three new High Courts i.e. Peshawar High Court, Lahore High Court, Sind and Baluchistan High Court were established by way of the High Court (Establishment) Order, 1970. Under Section 3(2) each new High Court was ordained to be a Court of Record with such power and authority as the High Court of West Pakistan. Thereafter in 1976 by way of the Baluchistan and Sind High Court (Order) 1976 two new High Courts i.e. the High Court of Baluchistan and the High Court of Sind were established and each such new High Court was conferred such powers and authority as the High Court of Sind and Baluchistan. In a nutshell, the power of the High Court to punish for contempt is an inherent jurisdiction and irrespective of whether such power conferred by the Constitution, 1973 constituted a fresh power or continuation of an existing power the jurisdiction is a special one, which as such is excluded from the purview of the Cr.P.C., as per Section 1(2) thereof.

38. On the other hand, the ECP does not have any inherent or Constitutional power to punish for contempt. It derives its power to punish for contempt from Section 10 of the Elections Act, which is reproduced herein below:-

> *"**10. Power to punish for contempt.**—The Commission may exercise the same power as the High Court to punish any person for contempt of court and the Contempt of Court Ordinance, 2003 (V of 2003), or any other law pertaining to contempt of court shall have effect accordingly as if reference therein to a "court" and to a "judge" were a reference, respectively, to the "Commission" and the "Commissioner" or, as the case may be, a member of the Commission."* [Emphasis added]

39. Sub-section (37) of Section 3 of the General Clauses Act, 1897 as well as sub-section (o) of Section 4 of the Cr.P.C., define the word 'offence' to mean *"any act or omission made punishable by any law for the*

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time being in force". The Full Bench of the Allahabad High Court in *State vs, Oadna Jabt Mulviya and another,* AIR 1954 ALL 523 was confronted with the question whether contempt punishable by the High Court is an offence within the meaning of Section 5(2) of the Code of Criminal Procedure. The Court acknowledged that the power to punish contempt is an inherent power of the High Court as well as a Constitutional power and that it was not created by the Contempt of Court Act, 1926. The Court considered the word 'law' as used in the definition of 'offence' provided for in the General Clauses Act and held that contempt would not be an offence unless made punishable by any law passed by a competent legislature or in other words by statute. Thus it was held that contempt of court is not an offence within the meaning of Section 5(2) of the Code of Criminal Procedure which deals with offences created by enacted law. On the other hand, in the case before me, contempt is punishable by ECP under the Elections Act. As such, contempt is an offence[5] within the meaning of the term as given in the General Clauses Act, 1897 and the Cr.P.C.

40. Sub-section (2) of Section 1, Cr.P.C., essentially provides that the Cr.P.C. extends to the whole of Pakistan but in the absence of any specific provision to the contrary nothing contained therein shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force[6] [emphasis added]. Furthermore, sub-section (2) of Section 5 of the Cr.P.C. provides that all offences under any other law (other than the PPC) shall be investigated inquired into, tried, and otherwise dealt with according to the provisions contained in the Cr.P.C., but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences [emphasis added].

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[5] *Abdul Hayee Khan vs. The Crown and another*, PLD 1956 (W.P.) Lahore 424.
[6] *Messrs Green Vally Trading Company vs. Additional Director of Adjudication State Bank of Pakistan and another,* 2003 YLR 1185.

41. Even if the Elections Act were to be regarded as a special law, it would not automatically take the enactment out of the scope of Cr.P.C. The Cr.P.C. would not affect a special law or special jurisdiction or a special form of procedure provided under a law for the time being in force only in the absence of any specific provision to the contrary in such law. Whereas, the Elections Act contains Section 199 which provides as follows:

> *"**199. Provisions of the Code to apply.—**In the matters relating to reporting, investigation, summons, warrants, enquiry, **trial of an offence** or other ancillary matters where any provision or any sufficient provision does not exist in this Act or the Rules, the provisions of the Code shall apply in the matter."* [Emphasis added]

The term 'Code' has been defined to mean the Cr.P.C. under Section 2(viii) of the Elections Act. Thus, the Elections Act is a law that contains a specific provision expressly making the Cr.P.C. applicable upon the stipulated matters to the extent provided thereby bringing it within the fold of the Cr.P.C., to such extent.

42. The learned counsel for ECP argued that *'trial of an offence'* does not refer to contempt proceedings and it refers to other offences provided for under the Elections Act. However, no cogent reason was given in support thereof. Examination of the Elections Act reveals that Chapter X provides the Offences, Penalties and Procedures. Sections 167 to 189 of the Elections Act relate to various offences and its penalties. Section 190 provides that *an offence under Chapter X* shall be tried by the Sessions Judge subject to Section 193 which provides for certain offences punishable under Section 174 to be tried by authorized officers. In addition, Section 192 provides for certain offences under the PPC to be tried by the Registration Officer. Thus Chapter X contains not only offences under the Elections Act but also refers to offences under the PPC.

43. Section 198 provides that punishment imposed for *an offence under this Chapter* i.e. Chapter X is in addition to any liability incurred under any other provision of the Elections Act. The use of the words *'an offence*

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under this Chapter' in Sections 190 and 198 indicates that there may be offences provided for under other chapters of the Elections Act. Had there been no offence provided for under any other chapter of the Elections Act the Legislature would have simply stated *offences under the Elections Act* in order to distinguish them from the offences under the PPC covered by Chapter X. Yet perusal of the provisions of the other chapters of the Elections Act does not reveal any offence other that the offence of contempt in Section 10.

44. On the other hand, the words 'under this chapter' are conspicuously missing from Section 199. Thus by virtue of Section 199 of the Elections Act read with Section 1(2) and 5(2), Cr.P.C., in my opinion, the provisions of Cr.P.C., shall apply to the reporting, investigation, summons, warrants, enquiry, or trial of the offence of contempt conducted by the ECP to the extent that no provision or sufficient provision exists for such matter in the Elections Act and the Rules.

45. The learned counsel for the ECP argued that by virtue of Section 3 of the Elections Act, the ECP is empowered to regulate its own procedure in the performance of its functions and duties and exercise of its powers. The Elections Act does not contain any provision pertaining to the venue for holding contempt proceedings. Therefore, she argued that the ECP was not bound to hold the contempt proceedings at its own premises and could hold such proceedings in Jail.

46. First of all it may be noted that Section 3 of the Elections Act is couched in general terms that the ECP shall regulate its own procedure in *inter alia* the exercise of its powers whereas Section 199 thereof specifically provides that the provisions of Cr.P.C. shall apply to *inter alia* the trial of an offence conducted by the ECP to the extent that no provision or sufficient provision exists for such matter in the Elections Act and the

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Rules. It is trite law that specific provisions contained in a statute on the same subject prevail over the general provisions[7].

47. Even otherwise, the application of Section 352, Cr.P.C., does not in any way conflict with the ECP's right to regulate its own procedure under Section 3 of the Elections Act. Section 352, Cr.P.C., simply provides that the place in which any criminal court is held for *inter alia* trying any offence shall be deemed an open Court to which the public generally may have access to so far as the same can conveniently contain them. Thus the effect of Section 352, Cr.P.C., would simply be that the place in which the ECP holds the trial of the offence of contempt shall be deemed an open Court to which the public generally may have access to so far as the same can conveniently contain them.

Application of Article 10-A of the Constitution upon contempt proceedings conducted by the ECP:

48. A public trial is even otherwise a requirement of a fair trial pursuant to Article 10-A of the Constitution. It has been held by this Court in *Saleem Ahmed Jan vs. Deputy Commissioner, Islamabad and 6 others,* 2024 CLC 953 that the power to punish contempt results in a conviction and a citizen can only be convicted through the exercise of judicial power and that such power is to be exercised in accordance with Article 10-A of the Constitution. Thus, the ECP is bound to exercise its power to punish contempt under Section 10 of the Elections Act in accordance with Article 10-A of the Constitution.

Public hearing an ingredient of a fair trial:

49. In her additional note to the judgment passed in *Jawwad S. Khawaja and others vs. Federation of Pakistan and others*, PLD 2024 SC 337, Justice Ayesha Malik has observed that a 'public hearing' is one of the basic ingredients for a fair trial in light of Article 10-A of the Constitution.

[7] *Muhammad Iqbal and others vs. Nasrullah,* 2023 SCMR 273; *Amir Akber Khan and others vs. National Accountability Bureau and others*, PLD 2022 Sindh 440.

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This Court in *Imran Ahmed Khan Niazi vs. Federation of Pakistan and others,* PLD 2024 Islamabad 155 has held that the insertion of 10-A in the Constitution through the Constitution (Eighteenth Amendment) Act, 2010 has elevated an accused's right to be tried in an open court in the usual court premises to a fundamental right and that an open trial is an integral component for a fair trial. The importance of an open and public trial has been explained in the said judgment as follows:

> "*72. The virtues of an open trial cannot be emphasized enough.* ***The open court principle is a hallmark of democratic society and applies to all judicial proceedings.[19] This principle has long been recognized as a cornerstone of the common law. Public access to the Courts guarantees the integrity of judicial process by demonstrating that justice is administered in a non-arbitrary manner, according to the rule of law.***[20] *Openness is necessary to maintain the independence and impartiality of the Courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by decisions of the Courts.*[21] *In Scott v. Scott*[22]*, Viscount Haldane held that the right of public access to the Courts is one principle turning not on convenience but on necessity.* ***In the same case, Lord Shaw held that "[i]n the darkness of secrecy, sinister interest and evil in every shape have full swing.*** *Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate.* ***Where there is no publicity there is no justice".*** *Lord Atkin in Ambard v. Attorney-General of Trinidad and Tobago*[23]*, speaking for the Privy Council, held that "justice is not a cloistered virtue". In Cora Lillian McPherson v. Oran Leo McPherson*[24]*, it was observed that publicity is the authentic hallmark of judicial procedure and the Court must be open to any who may present themselves for admission. In Estes v. Texas*[25]*, it was held that publicity serves to advance several of the particular purposes of the trial and, indeed, the judicial process. Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence. In Craig v. Harney*[26]*, it was held that a trial is a public event and what transpires in the courtroom is public property. In Sherman Estate v. Donovan*[27]*, the Supreme Court of Canada held as follows:-*
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> > *"Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy.* ***Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice.*** *The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness -- discouraging mischief and ensuring confidence in the administration of justice through transparency -- such that the strong presumption of openness*

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applies". [Emphasis added]

50. The Universal Declaration of Human Rights (UDHR) in Article 10; the International Covenant on Civil and Political Rights ratified by Pakistan on 23-6-2010 in Article 14; and the European Convention on Human Rights in Article 6 titled, right to a fair trial provide that all persons are entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of their [civil] rights and obligations and of any criminal charge against them.

51. Thus the discretion of the ECP, if any, to choose the venue for holding of contempt proceedings cannot be exercised in a manner that deprives the accused of his Constitutionally guaranteed right to a fair trial under Article 10-A of the Constitution. After all, it has been acknowledged in *Imran Ahmed Khan Niazi (Supra)* that even Section 352, Cr.P.C. and Rule 3 of the LHC Rules give discretion to the Magistrate as regards the place where a trial or inquiry is to be held and there is nothing in Cr.P.C. to compel a Magistrate to hold his Court in the usual Court premises. But the discretion to direct any particular case to be tried in jail is to be exercised sparingly and with caution. The judgment explains that *"Such discretion is not unfettered and cannot be exercised arbitrarily. Exercise of discretion is always guided by the circumstances of the case including the conduct of the parties. An order for a jail trial ought to be passed in exceptional cases after formation of the view based on tangible material that the holding of the trial outside jail may disrupt public order or internal security due to a surcharged atmosphere as to spoil and vitiate the requirements of a calm, detached and fair trial."*

52. Examination of the Impugned Orders does not reveal reference to any exceptional circumstances or to any material which would indicate that the holding of the contempt proceedings against the Petitioner in Adyala jail may impact public order or internal security or would vitiate the requirements of a calm, detached and fair trial. The only reason given for the ECP to call for the contempt proceedings against the Petitioner to be

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conducted in Adyala Jail is because of the contempt proceedings that were being held against Mr. Imran Khan in jail. Mr. Imran Khan is not a co-accused in the SCNs issued to the Petitioner nor is the Petitioner a co-accused in the show cause notices issued to Mr. Imran Khan for contempt. Admittedly, the alleged contemptuous conduct of the Petitioner and that of Mr. Imran Khan was on different dates and at different occasions. The learned counsel for ECP was unable to show how the fact that the Petitioner and Mr. Imran Khan were part of the same political party at the time of the alleged contempt by both necessitated the holding of contempt proceedings at the same venue especially at the cost of the Petitioner's Constitutional rights. As held in *Imran Ahmed Khan Niazi (Supra)* the considerations which ought to weigh in with the trial court in ordering to hold a sitting in jail are considerations of interest of justice, expeditious hearing of trial and a requirement of a fair and open trial which should be apparent in the judicial order passed for holding the trial in jail. Whereas, the reason given by ECP in the Impugned Orders for conducting the contempt proceedings against the Petitioner are neither in the interest of justice nor expeditious hearing or for the requirement of a fair and open trial. In fact, the reason given is entirely extraneous to the Petitioner's case.

53. This Court in *Imran Ahmed Khan Niazi (Supra)* also acknowledged that a trial conducted in jail can also be an open trial as members of the public can be permitted to witness the proceedings subject to security measures under the relevant prison rules. The judgment in *Imran Ahmed Khan Niazi (Supra)* specifically notes that a trial open to public would include not just the appellants' friends and relatives but also the representatives of the media and since that was not done it was held that the proceedings or trial conducted thus far were not just prejudicial to the rights of the appellants but invalid and therefore stood vitiated. In the present case, the Impugned Order II only allow the Petitioner's legal team, mother, and wife to attend the contempt proceedings to be conducted at Adyala Jail but do not provide for allowing attendance of

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the contempt proceedings in jail by members of the public or media representatives.

54. In fact, the learned counsel for ECP argued that the proceedings held in the ECP premises are also not public though she conceded that journalists are free to attend such proceedings whereas, neither journalists nor members of the general public were allowed to attend the contempt proceedings held by the ECP at Adyala Jail against the Petitioner thus far. The ECP cannot exercise the powers conferred upon a High Court and at the same time act in contravention of the requirements imposed upon a High Court while exercising such powers. I will refrain from going into the vires of Section 10 of the Elections Act as it is not under challenge before this Court. Whether Section 10 of the Elections Act is *ultra vires* or not is yet to be decided. However, as long as it remains on the statute books and the ECP exercises the powers conferred upon it thereunder it must do so strictly in accordance with Article 10-A of the Constitution, which includes holding of a public trial which requirement is not fulfilled just by allowing the Petitioner's lawyers and close family members to attend the proceedings..

55. To sum up, the Petitioner is entitled to a fair trial under Article 10-A of the Constitution, which *inter alia,* entails a public hearing. The Impugned Orders deprive the Petitioner of his Constitutional right to a fair trial by calling a jail trial of the alleged contempt against him without cogent reason and without ensuring that the jail trial is nevertheless an open trial and as such are *ultra vires* the Constitution and illegal. Given that the basic order i.e. the Impugned Orders have been found without lawful authority, the superstructure built upon it i.e. Impugned Notifications must also fall to the ground[8].

56. In view of the foregoing, the instant Petitions are **allowed** and the Impugned Orders dated 30.11.2023 and 12.12.2023 and Notifications dated

[8] *Vice-Chancellor Agriculture University, Peshawar, ibid .*

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8.12.2023 and 20.12.2023 are hereby **set aside** as being without lawful authority. Consequently, the contempt proceedings/trial conducted in Adyala Jail against the Petitioner which did not constitute an open trial stand vitiated for being in violation of Article 10-A of the Constitution.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in open Court on this 25th day of July, 2024.

JUDGE

Approved for reporting.

Tanveer Ahmed/*

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