

Decision on the Appeal of Zulfikar Ali Bhutto

**By the
Supreme Court of Pakistan**

8th December 1977.



**Reproduced by
Sani Hussain Panhwar
Member Sindh Council, PPP**

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P L D 1978 Supreme Court 40

Present: Anwarul Haq, C.J., Waheeduddin Ahmad, Muhammad Akram, Dorab Patel and Muhammad Haleem, J J

Mr. ZULFIKAR ALI BHUTTO – Appellant

versus

The STATE – Respondent

Criminal Appeal No. 109 of 1977, decided on 8th December 1977.

(On appeal from an order of the Lahore High Court made on 9-10-1977 in Cr. Misc. Petitions Nos. 932-M and 933-M of 1977 in Cr. Misc. No. 3854-Bj77 and Cr. Original No. 60 of 1977).

(a) Constitution of Pakistan (1973) -

-Arts. 192, 196 and 197 – High Court, constitution and continuity of – Contentions: That holding a constitutional office and performing its functions are synonymous: that permanent Chief Justice of High Court having ceased to perform functions of his office due to his appointment as a whole time Governor of Province also ceased to hold office of Chief Justice – Held: Not correct – Constitution and continuity of High Court not affected by a temporary vacancy in office of Chief Justice or of any Judges from among prescribed strength of High Court but would be affected only when office of Chief Justice abolished. – (High Court).

There is a distinction between a vacancy in any office, and its abolition. The existence of a vacancy implies that the office exists. The true requirement of Article 192 of the Constitution (1973) is that in order to bring a High Court into existence there should be created the offices of a Chief Justice and the prescribed number of Judges. If these offices have been created, then the High Court has properly come into existence, and would be able to start functioning as soon as appointments to these offices or to some of them have been made. Any temporary vacancy in any of these offices would not affect the constitution and jurisdiction of the High Court. This view is clearly borne out by the fact that Article 196 of the Constitution itself contemplates that the office of the Chief Justice of a High Court

may be vacant at any given time or the Chief Justice may be absent or otherwise unable to perform the functions of his office due to any other cause. In such a contingency the Constitution contemplates the appointment of an Acting Chief Justice, and it is obvious that there may be some time lag between the occurrence of a vacancy and the appointment of an Acting Chief Justice. A similar provision is made, by Article 197 of the Constitution, regarding the appointment of Additional Judges of the High Court when the office of a Judge is vacant, or he is unable to perform the functions of his office, or for any reason it is necessary to increase the number of Judges of a High Court. If Article 192 of the Constitution were to be construed in the manner canvassed then the likelihood of frequent interruptions and discontinuity in the work of the High Court cannot be ruled out, as vacancies in the office of the Chief Justice or the offices of the prescribed number of Judges may occur owing to human factors, and the inevitable time lag which must intervene 'between' the occurrence of a sudden vacancy and its filling up; whether on a temporary or permanent basis by the President of Pakistan. The provisions of the Constitution cannot be interpreted in a manner calculated to bring to a halt the functioning of judicial institutions on the happening of contingencies which are inherent in human affairs. The constitution and continuity of the High Court is not affected by a temporary vacancy in the office of the Chief Justice or of any of the Judges from among the prescribed strength of the High Court; it would be affected, only if the office of the Chief Justice were to be abolished, and in that case alone could it be said that the High Court has ceased to be properly constituted in terms of Article 192 of the Constitution. (p.49) A.

Lal Singh *vs.* Ghansham Singh I L R 9 All. 625; Emperor *vs.* Sohrai Koeri A I R 1938 Pat. 550 and Sampatlal *vs.* Baliprasad Shah A I R 1950 Assam 6 ref.

(b) Constitution of Pakistan (1973)-

Arts. 195, 196(b), 20, 207 & 209. – Vacation of office of Chief Justice – Temporary appointment of Chief Justice of High Court as Acting Governors of Province – Does not amount to vacation of office of _ Chief Justice by incumbent o that office.

The holding of the office of Chief Justice and the ability to perform its functions are two different concepts, as made clear by the provisions of Article 196 of the Constitution (1973). Clause (b) of this Article leaves no doubt that the Chief Justice does not vacate his office simply because he is absent or is unable to perform the functions of his office due to any other cause in other words, he continues to hold the office, even though he may not be able to perform its functions. A Judge of a High Court, which term also includes the Chief Justice, does not cease to hold office unless he retires on attaining the age of superannuation as presented in Article 195 of the Constitution; or he resigns

from his office under Article 206; or is removed from his office under Article 209 of the Constitution; or dies. Another situation in which he may be deemed to have vacated his office is where he accepts another substantive and permanent office although without formally tendering his resignation from his judgeship. Apart from these situations, a Judge does not vacate his office simply by temporarily ceasing to perform its functions, or by temporarily taking up another assignment or office in, terms of the permission granted by Article 207 of the Constitution. It follows, therefore, that by his temporary appointment as Acting Governor the Chief Justice has not vacated the office of the Chief Justice of the High Court. (p. 50)B

Abrar Hasan vs. Government of Pakistan P L D 1976 S C 315 ref.

(c) Constitution of Pakistan (1973)

– Art. 193 read with Proclamation of Martial Law (dated 5-7-1977) and Laws (Continuance in Force) Order, 1977 (CMLA's 1 of 1977) – Acting Chief Justice, appointment of – Chief Martial Law Administrator, or President on advice of Chief Martial Law Administrator competent to appoint Acting Chief Justice during absence or inability of permanent Chief Justice of High Court to perform his functions. (p. 50)C

Begum Nusrat Bhutto v. Chief of the Army Staff P L D 1977 S C 657 ref.

(d) High Courts (Appointment of Acting Chief Justice) Order, 1977 (President's (Post Proclamation) Order (2 of 1977))

Read with Constitution of Pakistan (1973, Art. 196 – Acting Chief Justice, validity of appointment of – Power to appoint Acting Chief Justice of High Court being already available under Art. 196, Constitution of Pakistan (1973), Acting Chief Justice, held, could be appointed even without promulgation of Order 2 of 1977 – Promulgation of such Order hence would not in any manner invalidate appointment of Acting Chief Justice. (p. 51)D

(e) High Court Judges (Oath of Office) Order, 1977 [President's (Post Proclamation) Order (1 of 1977) .] -

- And President's (Post Proclamation) Order (2 of 1977) read with Constitution of Pakistan (1973), Art. 194 – Oath of office – Oath, modified form of – Certain parts of Constitution of Pakistan (1973) having been held in abeyance in accordance with Proclamation of Martial Law – Modified oath prescribed by President's (Post Proclamation) Order (2 of 1977) read with President's (Post Proclamation) Order (1 of 1977) in accord with factual position prevailing in respect of operation of Constitution, held, would not

render appointment of Acting Chief Justice invalid. (p. 51)E

(f) High Court Judges (Oath of Office) Order, 1977 [President's (Post Proclamation) Order (1 of 1977)]

And High Courts (Appointment of Acting Chief Justice) Order, 1977 (President's Post Proclamation) Order (2 of 1977)) read with Constitution of Pakistan (1973), Art. 194 – Whether necessary for acting incumbent of constitutional office to take oath prescribed for permanent incumbent of such office (Quaere) . (p. 51) F

(g) Constitution of Pakistan (1973)

Arts. 215 (1), 216, cl. (2), provisos (a) & (b) & 217 – Chief Election Commissioner – Disability to hold any other office – Disability imposed by Art. 216 – Applies to person holding permanent and substantive appointment of Chief Election Commissioner for a term or terms specified in Art. 215 (1) read with proviso (b) to cl. (2) of Art. 216, which in aggregate may amount to a period of seven years and not to an acting appointment made under Art. 217 – Article 217, held, permits simultaneous performance of judicial functions by a Judge of Supreme Court appointed as Acting Chief Election Commissioner - Article 216, held further, to be strictly construed so as to restrict its application to a permanent and substantial appointment made in terms of Constitution and for purpose of holding elections there under and cannot be extended by analogy to appointment not falling in such category – Temporary and ad hoc appointment of Acting Chief Justice as Chief Election Commissioner for limited purpose of holding forthcoming elections – Held, not covered by prohibition contained in Art. 216 and simultaneous performance of both functions not barred.– (Chief Election Commissioner).

Article 216 of the Constitution does indeed prohibit the Chief Election Commissioner, during the continuance of his office as such, from holding any other office of profit in the service of Pakistan; or occupying any other position carrying a right to remuneration for the rendering of services. This prohibition also applies to the performance of judicial functions by a person who is a serving Judge of the Supreme Court or of a High Court at the time of his appointment as Chief Election Commissioner. However, by virtue of the special saving clause contained in proviso (a) to clause (2) of Article 216 such a person may resume his judicial function on the expiration of his term as Chief Election Commissioner. It is also clear that the disability imposed by Article 216 of the Constitution applies to a person holding the permanent and substantive appointment of the Chief Election Commissioner for the term or terms specified in Article 215(1) read with

proviso (b) to clause (2) of Article 216 of the Constitution, the aggregate of which may amount to a period of seven years. The disability or prohibition does not apply to an acting appointment made under Article 217 of the Constitution, which provision permits the simultaneous performance of judicial functions by a Judge of the Supreme Court appointed as Acting Chief Election Commissioner. Finally as Article 216 is in the nature of a constitutional prohibition, it is to be strictly construed in the sense that it shall apply only to a permanent and substantive appointment made in terms of the Constitution, and for the purpose of holding elections there under, and cannot be extended by analogy to an appointment not falling in this category. (p. 55)G

The appointment as the Chief Election Commissioner is in the nature of a temporary and ad hoc appointment in a situation not covered or contemplated by the Constitution of 1973. It is not a permanent and substantive appointment in terms of the Constitution, but is merely intended for the limited purpose of holding the forthcoming general elections, notwithstanding the fact that certain other duties or powers may also have been conferred on him. It is, therefore, not an appointment to which the prohibition contained in Article 216 of the Constitution can be attracted. Accordingly, there is no bar in the way of the Chief Election Commissioner continuing to perform his judicial functions as a Judge and Acting Chief Justice of the High Court. (p. 60)S

10 I C 257; Parameswaran Pillai Bhaskaran Pillai v. State Prosecutor A I R 1951 Trav. Co. 45; Farzand Ali v. Province of West Pakistan P L D 1970 S C 98; Abrar Hassan v. Government of Pakistan P L D 1976 S C 315; Rao Muhammad Ishfaq Khan v. Mr. Justice Mushtaq Hussain etc. W. P. No. 2141 of 1964 and Malik Ghulam Jilani v. Mr. Justice Muhammad Gul 1978 SCMR 110 ref.

(h) Chief Election Commissioner (Oath of Office) Order, 1977 [President's (post Proclamation) Order (3 of 1977)]

And Election Commission Order, 1977 (President's (Post Proclamation) Order (4 of 1977)) read with Constitution of Pakistan (1973), Arts. 58, 112, 215 & 218 – Significant departures made by Presidential Order from corresponding provisions of Constitution on subject of elections. (p. 56) H

(i) Election Commission Order, 1977 [President's (Post Proclamation) Order (4 of 1977)]

Art. 4 and Houses of Parliament and Provincial Assemblies (Elections) Order [President's (Post Proclamation) Order (5 of 1977) j, Art. 24 - Forthcoming elections – Held, not covered by Constitution of Pakistan (1973) – Deeming provision of Art. 24 of Order (5 of 1977) – Cannot in terms attract provisions

contained in cl. (I) , Part VIII of Constitution (1973) relating to elections – Provision of Art. 4, Order (4 of 1977) - Does not support proposition of Chief Election Commissioner’s appointment being a regular and permanent appointment falling within ambit of Constitution (1973). (pp. 56, 57. I – J and K)

(j) Judicial review

Power of – Court not to sit in appeal over executive or legislative authority nor to substitute its own discretion for that of competent authority - Responsibility for relevant action, its methodology and procedural details, held, must rest on authority concerned.

It must be clearly understood that in judging whether an action taken by the President or the Chief Martial Law Administrator is valid under the law of necessity, the Court is not to sit in appeal over the executive or legislative authority concerned, nor substitute its own discretion for that of the competent authority. The responsibility for the relevant action, its methodology and procedural details must rest on that authority. In exercising its power of judicial review the Court is concerned with examining whether the impugned action reasonably falls within any of the categories enumerated by the Supreme Court in Begum Nusrat Bhutto’s case. (p. 59)N

Begum Nusrat Bhutto v. State P L D 1977 S C 657 ref.

(k) Judicial review

Reasonability of action – What is reasonable and what is not – To be judged by standards of an ordinary prudent and reasonable citizen and dependent on prevailing circumstances and object of action taken. (p. 58)O

(l) Chief Election Commissioner (Oath of Office) Order, 1977 [President’s (Post Proclamation) Order (3 of 1977)]

Election Commission Order [President’s (Post Proclamation) Order (4 of 1977)] and Houses of Parliament and Provincial Assemblies, (Elections) Order, 1977 [President’s (Post Proclamation) Order (5 of 1977)] read with Proclamation of Martial Law [dated 5-7-1977] Chief Election Commissioner (Oath of Office) Order, 1977 [President’s (Post Proclamation) Order (3 of 1977)], Election Commission Order, 1977 [President’s (Post Proclamation) Order (4 of 1977)] and Houses of Parliament and Provincial Assemblies (Elections) Order, 1977 [President’s (Post Proclamation) Order (5 of 1977)] – Held, fall within objectives of Martial Law to ensure restoration of

democratic institutions under Constitution and their validity could not be questioned on ground of being not necessary. (pp. 57, 58, 59, 60) L,M,P&Q

(m) Judicial review

Court, held, would traverse outside scope of its powers of judicial review in dictating to Government procedural and administrative details necessary for holding elections. (p. 60)R

(n) Constitution of Pakistan (1973)

Arts. 217 & 218 – Independence of judgement - Combination of offices of Chief Election Commissioner and High Court Judge in one person -Held, not likely to affect such person's independence in either or both such capacities.

The contention that the combination of the two offices in one person is likely to affect his independence in either or both these capacities as well as the apprehension underlying it are unfounded. Even the Constitution of 1973, by its Article 217, permits a serving Judge of the Supreme Court to be appointed as the Acting Chief Election Commissioner, thereby showing that the makers of the Constitution did not entertain any apprehension that a temporary responsibility of this nature was likely to adversely affect the independence of such Judge in either capacity. Similarly, Article 218 of the Constitution provides that two serving Judges of the High Court shall act as Member, of the Commission for the purpose of holding a General election. There is no provision that during such membership they would cease to function as Judges of the High Court. Judicial notice can also be taken of the fact that in the past Chief Justices or Judges of the High Courts have been appointed to undertake the work of delimitation of electoral constituencies in addition to their judicial functions. Serving Judges have also been called upon to work as Election Tribunals. (p. 60)T

Yahya Bakhtiar, Senior Advocate, D. M. Awan, Advocate, Ghulam Ali Memon, Advocate and Rana Maqbool Ahmed Qadri, Advocate-on-Record for Appellant.

Sharifuddin Pirzada, Attorney-General for Pakistan, Dilawar Mahmood, Deputy Attorney-General, M. Afzal Lone, Deputy Attorney-General, Maqbool Elahi Malik, Advocate-General, Punjab, Irshad Hasan Khan, Advocate, Riaz Ahmed, Assistant Advocate-General, Punjab and Sh. Ijaz Ali, Advocate-on-Record for -the State.

Dates of hearing: 7th and 8th December, 1977.

JUDGMENT

Anwarul Haq, C.J. — This appeal, by the leave of the Court, has arisen in the following circumstances.

On the 11th of November 1974 a first information report was registered at the instance of Mr. Ahmed Raza Qasuri, then a member of the National Assembly regarding the murder of his father Nawab Muhammad Ahmad Khan Qasuri, alleging that the murder had been committed at the instance of the appellant, Zulfikar Ali Bhutto, who was then the Prime Minister of Pakistan, for the reason that serious political and personal differences had arisen between the first informant and the former Prime Minister, and the attack was in fact aimed at the informant. The investigation of the case did not lead to positive results at that time. Accordingly, Mr. Ahmed Raza Qasuri filed a private complaint after Mr. Bhutto's Government fell on the imposition of Martial Law on the 5th of July 1977.

The case was transferred to the original side of the High Court and was pending before a Division Bench, of which Mr. Justice K. M. A. Samadani was a member.

In the meantime, the Police Investigation on the basis of the F. I. R. dated the 11th of November 1974 was also revived, and the appellant was arrested on this account on the 3rd of September 1977. On the 11th of September, 1977 an incomplete challan was presented to the Court of the Magistrate concerned who forwarded it to the Sessions Court, Lahore.

On the 13th of September 1977, Mr. Justice K. M. A. Samadani allowed bail to the appellant in the challan case observing, however, that the bail could be cancelled in the light of any fresh material being made available to connect the appellant with the crime.

On that very day the Acting Chief Justice of the Lahore High Court, Mr. Justice Mushtaq Hussain, on an application made by the State through the Special Public Prosecutor, ordered the transfer of the challan case for trial on the original side of the High Court, and constituted a Bench of five Judges for this purpose, It appears that the private complaint was also ordered to be placed before the same Full Bench by the learned Judges of the Division Bench who had earlier taken cognizance of the same.

On the 20th of September 1977, an application was moved by the State for the cancellation of the bail granted to the appellant by Mr. Justice K. M. A. Samadani, in which notice was issued to the appellant and served upon him in Karachi Jail, where he had been detained on the 17th of September 1977 under Martial Law Order No. 12. The challan case was also fixed for hearing before the Full Bench on the 24th of September 1977.

On the 21st of September 1977, the appellant filed a petition for special leave to appeal in the Supreme Court against the order of the Acting Chief Justice dated the 13th of September 1977 transferring the case from the Sessions Court to the original side of the High Court, inter alia, on the grounds that the High Court was not properly constituted in terms of Article 192 of the Constitution, that the Acting Chief Justice had not been validly appointed by any competent authority, that the transfer of the case was made without notice to the appellant, and that in any case Mr. Justice Mushtaq Hussain had a personal bias against the appellant. This petition was dismissed by the Supreme Court on the 24th of September 1977, observing that all these points should, in the first instance, be raised before the High Court.

Accordingly, two petitions were filed in the High Court on 4-10-1977. Criminal Miscellaneous Petition No. 532-M of 1977 related to the constitution of the High Court and the validity of the appointment of the Acting Chief Justice; whereas Criminal Miscellaneous Petition No. 933-M of 1977 related to the alleged personal bias of the learned Acting Chief Justice against the petitioner. Both these petitions were dismissed by the High Court by its order dated the 9th of October 1977.

During the course of arguments at the petition stage Mr. Yahya Bakhtiar stated that he would like to withdraw the prayer for special leave to appeal in so far as it concerned the allegation of bias on the part of the learned Acting Chief Justice as contained in Mr. Bhutto's Miscellaneous Petition No. 933-M of 1977 presented in the Lahore High Court. In view of this statement the petition for special leave to appeal was, therefore, dismissed in so far as this point was concerned.

As regards the constitution of the High Court and the validity of the appointment of Mr. Justice Mushtaq Hussain as the Acting Chief Justice of that Court, Mr. Yahya Bakhtiar contended that: –

- (i) The High Court was not properly constituted in terms of Article 192 of the 1973 Constitution as the permanent Chief Justice, Mr. Justice, Aslam Riaz Hussain was no longer holding the office of the Chief Justice, nor was he performing its functions, having been appointed as the Acting Governor of

the Punjab and having relinquished charge of the office of Chief Justice with effect from the 13th of July 1977;

- (ii) Mr. Justice Mushtaq Hussain had not been appointed as Acting Chief Justice of the High Court by a competent authority in terms of the Constitution;

- (ii) The Acting Chief Justice had not taken the oath as prescribed by Article 194 of the Constitution read with Schedule III, thereof, and had instead taken a modified oath prescribed under President's Order (Post Proclamation) No. 1 of 1977 – High Court Judges (Oath of Office) Order, 1977 – with the result that he could not be regarded as having validly entered upon his new office;

- (iii) Even if it be assumed that Mr. Justice Mushtaq Hussain had been validly appointed as Acting Chief Justice, and had validly assumed the duties of his office, yet he could not continue in the capacity after his appointment as the Chief Election Commissioner with effect from the 17th of July 1977, as Article 216 of the Constitution prohibited the Chief Election Commissioner from holding any other office of profit in the service of Pakistan; and

- (iv) In the alternative, Mr. Justice Aslam Riaz Hussain still continued to be the permanent Chief Justice of the High Court as his appointment as the Acting Governor of the Punjab was unconstitutional and not justified on the grounds of necessity or welfare of the people with the necessary consequence that there was no occasion at all for the appointment of an Acting Chief Justice.

By an order made on the 29th of November 1977, all the contentions relating to the validity of the constitution of the Lahore High Court as well as of the Full Bench trying the appellant were repelled, except the one resting on the provisions of Article 216 of the 1973 Constitution. Leave to appeal was accordingly granted only to examine the limited question whether in terms of President's (Post Proclamation) Order No. 4 of 1977 read with the relevant provisions of the Constitution, it is permissible for one person to combine in himself the functions and duties of two constitutional offices, namely, the Acting Chief Justice of the High Court and the Chief Election Commissioner. It was observed on that occasion that our reasons for rejecting the other contentions would be given in detail in the final order disposing of the appeal.

The Appeal itself was dismissed by a short order on the 8th of December 1977. The present judgment is intended to give our reasons for the orders already made by us on the 29th of November 1977 as well as the 8th of December 1977 respectively.

We shall first take up the question whether the Lahore High Court is at present properly constituted or not in terms of Article 192 of the Constitution, for the reason that the permanent Chief Justice, Mr. Justice Aslam Riaz Hussain, was appointed as Acting Governor of the Punjab on the 6th of July 1977 and relinquished the office of the Chief Justice on the 13th of July 1977, on which date Mr. Justice Mushtaq Hussain was appointed as Acting Chief Justice. It is contended by Mr. Yahya Bakhtiar that from that date Mr. Justice Aslam Riaz Hussain ceased to hold the office of the Chief Justice of the Lahore High Court, with the result that the office of the Chief Justice became vacant, thereby rendering invalid the constitution and continuity of the Lahore High Court, for Article 192 of the Constitution clearly prescribes that "A High Court shall consist of a Chief Justice and so many other Judges as may be determined by law or, until so determined, as may be fixed by the President." He submits that holding a constitutional office and performing its functions are synonymous, and as the permanent Chief Justice has ceased to perform the functions of his office, owing to his appointment as a whole time Acting Governor since the 13th of July 1977, it must be held that he has also ceased to hold the office of the Chief Justice.

The argument of the learned counsel for the appellant proceeds on the assumption that Article 192 of the Constitution is to be construed as meaning that a vacancy in the office of the Chief Justice of the High Court would automatically render invalid its constitution and continuance. This does not appear to be correct.

In *Lal Singh v. Ghansham Singh (1)*, it was held that the failure of the Government to fill up a vacancy among the Judges under the powers conferred by section 7 of the High Court's Act did not render illegal the functioning of the High Court even though by section 2 of the Letters Patent it was provided that the High Court shall consist of a Chief Justice and five Judges. In the various judgments delivered by the learned Judges of the Full Bench a distinction appears to have been drawn between the constitution of the High Court as such, and the fact whether at any particular time all the vacancies had been filled or not. The existence of a vacancy was held not to affect the constitution of the High Court. It is true that this case concerned a vacancy among the five Judges of the Court and not that of the Chief Justice, but on principle there would not appear to be any difference between the two situations.

However, the question of the effect of the office of the Chief Justice remaining

vacant was directly considered in *Emperor vs. Sohrai Kaeri* (2). The learned Chief Justice of the High Court had died in England, and an objection was taken that there being no Chief Justice, the High Court was not properly constituted and the Bench hearing that particular case ceased to have jurisdiction to pronounce judgment, which had been reserved on the conclusion of arguments at an earlier date. The objection was based on the fact that clause (2) of the Letters Patent, by which the High Court was created, provided that it shall consist of a Chief Justice and six other Judges. The learned Judges overruled the objection on the ground that clause (2) of section 222 of the Government of India Act, 1935, clearly contemplated the appointment of an Acting Chief Justice if the office of the Chief Justice of a High Court became vacant, or if any such Chief Justice was by reason of absence or for any reason, unable to perform the duties of his office. The learned Judges went on to say that "Thus the contingency of the office of Chief Justice remaining vacant for some time is expressly recognised and provided for." In the case of "a vacancy caused by death, some time must necessarily elapse before a new appointment is made. It will be preposterous to hold that during that interval there is no properly constituted High Court. The vacancy in any office implies that the office exists. Vacancy must be distinguished from abolition of the office. When a Chief Justice dies the office does not die with him but still continues. It only remains vacant until it is filled up So long as the office is not abolished the constitution remains unbroken and unchanged."

A similar view was taken in *Sampatlal vs. Baliprasad Shah* (1) in which an objection to the constitution of the Assam High Court on the ground that the Chief Justice alone had been appointed before the prescribed day was overruled, and it was said that delay in the appointment of the other Judges did not affect the constitution of the High Court and the Chief Justice was not debarred from performing the duties of his office or from discharging his function as a Single Judge till the appointment of other Judges. The distinction made in the two earlier cases mentioned above between vacancy in the office of the Chief Justice and its total abolition was reiterated.

We have no hesitation in adopting the view taken in these cases from the Indian jurisdiction. There is indeed a distinction between a vacancy in any office, and its abolition. The existence of a vacancy implies that the office exists. The true requirement of Article 192 of the Constitution is that in order to bring a High Court into existence there should be created the offices of a Chief Justice and the prescribed number of Judges. If these offices have been created, then the High Court has properly come into existence, and would be able to start functioning as soon as appointments to these offices or to some of them have been made. Any temporary vacancy in any of these offices would not affect the constitution and jurisdiction of the High Court. This view is clearly borne out by the fact that Article 196 of the Constitution itself contemplates that the office of the Chief

Justice of a High Court may be vacant at any given time or the Chief Justice may be absent or otherwise unable to perform the functions of his office due to any other cause. In such a contingency the Constitution contemplates the appointment of an Acting Chief Justice, and it is obvious that there may be some time lag between the occurrence of a vacancy and the appointment of an Acting Chief Justice. A similar provision is made, by Article 197 of the Constitution, regarding the appointment of Additional Judges of the High Court when the office of a Judge is vacant, or he is unable to perform the functions of his office, or for any reason it is necessary to increase the number of Judges of a High Court. If Article 192 of the Constitution were to be construed in the manner canvassed by Mr. Yahya Bakhtiar, then the likelihood of frequent interruptions and discontinuity in the work of the High Court cannot be ruled out, as vacancies in the office of the Chief Justice or the offices of the prescribed number of Judges may occur owing to human factors, and the inevitable time lag which must intervene between the occurrence of a sudden vacancy and its filling up, whether on a temporary or permanent basis by the President of Pakistan. The provisions of the Constitution cannot be interpreted in a manner calculated to bring to a halt the functioning of judicial institutions on the happening of contingencies which are inherent in human affairs. We are, therefore, of the view that the constitution and continuity of the High Court is not affected by a temporary vacancy in the office of the Chief Justice or of any of the Judges from among the prescribed strength of the High Court, it would be affected only if the office of the Chief Justice were to be abolished, and in that case alone could it be said that the High Court has ceased to be properly constituted in terms of Article 192 of the Constitution.

It is, however, not necessary to pursue this point any further, for the reason that we are in agreement with the view expressed by the High Court, in the order under appeal, that the holding of the office of Chief Justice and the ability to perform its functions are two different concepts, as made clear by the provisions of Article 196 of the Constitution, referred to above. Clause (b) of this Article leaves no doubt that the Chief Justice does not vacate his office simply because he is absent or is unable to perform the functions of his office due to any other cause. In other words, he continues to hold the office, even though he may not be able to perform its functions.

We consider that the High Court has also rightly observed, in another part of its order, that a Judge of a High Court, which term also includes the Chief Justice, does not cease to hold office unless he retires on attaining the age of superannuation as prescribed in Article 195 of the Constitution; or he resigns from his office under Article 206; or is removed from his office under Article 209 of the Constitution; or dies. Another situation in which he may be deemed to have vacated his office is, as held in *Abrar Hasan vs. Government of Pakistan* (1), where he accepts another substantive and permanent office, although without

formally tendering his resignation from his judgeship. Apart from these situations, a Judge does not vacate his office simply by temporarily ceasing to perform its functions, or by temporarily taking up another assignment or office in terms of the permission granted by Article 207 of the Constitution. It follows, therefore, that by his temporary appointment as Acting Governor of the Punjab, Mr. Justice Aslam Riaz Hussain has not vacated the office of the Chief Justice of the High Court. According to the argument that the constitution of the High Court is rendered invalid owing to a vacancy in the office of the Chief Justice cannot be sustained on this ground as well.

The next contention that the Acting Chief Justice has not been appointed by a competent authority is no longer available in view of the judgement of this Court in *Begum Nusrat Bhutto v. Chief of the Army Staff (2)*, in which the imposition of Martial Law by the Chief of the Army Staff has been held to be valid on the ground of State necessity, and it has further been held that the Chief Martial Law Administrator has the power to perform, inter alia all actions which could be taken under the 1973 Constitution. It is, therefore clear that he, or on his advice the President of Pakistan, was competent to appoint an Acting Chief Justice during the absence or inability of the permanent Chief Justice of the High Court to perform his function.

It was next contended that the appointment of the Acting Chief Justice was also invalid for the reason that he had not taken the oath as required by Article 194 of the Constitution and as set out in the Third Schedule thereto, but he had instead taken a different oath under the High Courts (Appointment of Acting Chief Justice) Order, 1977 [President's (Post Proclamation) Order No. 2 of 1977] read with High Court Judges (Oath of Office) Order, 1977 [President's (Post Proclamation) Order No. 1 of 1977]. It was further submitted that in any case President's (Post Proclamation) Order No. 2 of 1977 regarding the appointment of Acting Chief Justices of the various High Courts was unnecessary, as provision in this behalf already existed in Article 196 of the Constitution.

As to the necessity or otherwise of the President's (Post Proclamation) Order No. 2 of 1977, it will suffice to say that it is indeed correct that the power to appoint an Acting Chief Justice of a High Court was already available under Article 196 of the Constitution, and an Acting Chief Justice could, therefore, have been appointed even without the promulgation of this Order. It is, however obvious that the promulgation of this Order would not in any manner invalidate an appointment which could clearly have been made in terms of the Constitution itself.

As to the modified form of the oath prescribed by President's (Post Proclamation) Order No. 1 of 1977, it will be seen that certain portions of the

1973 Constitution had been held in abeyance by the Proclamation made by the Chief of the Army Staff on the 5th of July 1977, by which the country was brought under Martial Law, and the Federal and the Provincial Legislature as well as the cabinets functioning at the Centre and in the Provinces were abolished. This Court has no doubt held, in the recent judgment already referred to above, that the 1973 Constitution continues to be the supreme law of the land, but at the same time we have also taken note of the fact that certain parts thereof remain in abeyance in accordance with the Proclamation. The modified oath has, therefore, been prescribed by the President to accord with the factual position prevailing in respect of the operation of the Constitution. This objection, therefore, also fails.

There has been some discussion at the Bar as to whether it is at all necessary for an Acting Chief Justice to take the oath prescribed by Article 194 of the Constitution, as the operative words in that Article are “before entering upon office”, but an Acting Chief Justice appointed in terms of clause (b) of Article 196 of the Constitution during the temporary absence or inability of the permanent Chief Justice does not enter upon that office, as the office continues to be occupied by the permanent incumbent. It was submitted that such an Acting Chief Justice merely performs the duties and functions of the office of the Chief Justice, without formally “entering upon that office.” We did not hear full arguments on this point for the reason that on merits we were satisfied that the appointment of the Acting Chief Justice was not invalidated on account of his having taken the modified oath prescribed by the President in the prevailing circumstances. Accordingly, we would like to reserve our opinion on the point whether it is necessary for an acting incumbent of a constitutional office to take the oath prescribed for the permanent incumbent thereof.

Coming now to the point on which leave to appeal was granted, it may be stated that a preliminary objection was taken by the learned Attorney-General to the effect that the validity of the appointment of Mr. Justice Mushtaq Hussain as Acting Chief Justice of the Lahore High Court, and his continuance as such after his appointment as Chief Election Commissioner, cannot be assailed in collateral Proceedings arising out of an order made by the Full Bench of which he was the presiding Judge, on the 9th of October 1977. In support of this proposition he relied on 16 I C 257, Parameswaran Pillai Bhaskaran Pilai *vs.* State Prosecutor (1) and Farzand Ali *vs.* Province of West Pakistan (2). He submitted that the only way the appointment of a Judge of a superior Court, which term would include Chief Justice or the Acting Chief Justice, could be challenged was by way of a petition for a writ of quo warranto.

While the cases referred to by the learned Attorney-General do indeed support the objection raised by him, but this Court was equally divided on this

question when deciding *Abrar Hasan vs. Government of Pakistan*. Two of the Judges constituting the Bench took the view that in view of the definition of the term person as contained in Article 199 of the Constitution a writ of quo warranto did not lie against a Judge of the High Court, whereas the other two members of the Bench took the contrary view. In the opinion of the former, it was possible to bring under challenge a judgment delivered by a Judge of a superior Court on the ground that he was not qualified to hold the office or that the High Court was not properly constituted. In other words, the validity of the appointment could be assailed in such collateral proceedings though not by way of quo warranto. In view of this difference of opinion in the latest judgment of this Court, and also for the reason that it was necessary in the public interest to give an authoritative pronouncement as to the true meaning and scope of Article 216 of the Constitution in relation to the appointment of the Chief Election Commissioner made under the relevant Post Proclamation Order issued by the President to make arrangements for the forthcoming elections, we decided to hear detailed arguments on the merits of the contentions raised on behalf of the appellant. In the circumstances, the learned Attorney-General agreed not to press his preliminary objection any further and stated that he would also prefer a decision on the merits.

It was contended by Mr. Yahya Bakhtiar, learned counsel for the appellant, that Article 216 of the Constitution was complete bar in the way of the Chief Election Commissioner holding any other office of profit in the service of Pakistan, and that the learned Judges in the High Court were in error in thinking that it was analogous to Article 207 of the Constitution creating a similar bar in respect of the High Court Judges. He submitted that there were certain significant differences between the two Articles which had been overlooked by the High Court. He next contended that as the 1973 Constitution continued to the supreme law of the land, there was no necessity or justification for the President of Pakistan to issue various Post Proclamation Orders to make special provisions for the holding of the forthcoming elections, or to vary the terms of appointment of the Chief Election Commissioner, as all these matters stood fully provided for in Chapter I of Part VIII of the Constitution relating to the holding of elections, which part had not been held in abeyance by the Proclamation of Martial Law on the 5th of July 1977. He argued that as in any case the forthcoming elections were to be construed as having been held under the 1973 Constitution all the provisions relating to the appointment of the Chief Election Commissioner would be fully attracted, notwithstanding the fact that the appointment purported to have been made under one of the Post Proclamation Order. Finally, he contended that, in any case, extensive powers had been conferred upon the Chief Election Commissioner, by Martial Law Order No. 25 dated 26-12-1977, to probe into irregularities committed in the past elections of 1970 and 1977, with the result that his appointment should be deemed to be for an indefinite period,

thus fully attracting the salutary provisions of Article 216, of the Constitution, which are intended to ensure complete independence for the Chief Election Commissioner.

In reply, the learned Attorney-General submitted that assuming that Article 216 of the Constitution was a complete bar in the way of the Chief Election Commissioner holding any other office of profit in the service of Pakistan, the fact remains that the bar related to the permanent Chief Election Commissioner appointed in terms of the Constitution, and not to a Chief Election Commissioner who had been appointed on an ad hoc basis for a temporary purpose, namely, for the holding of the forthcoming general elections only. He pointed out that Article 217 of the Constitution, relating to the appointment of an Acting Chief Election Commissioner, clearly showed that in case of a temporary appointment, there was no prohibition in the way of the Chief Election Commissioner to perform his judicial functions on the Supreme Court. He next submitted that the situation created by the massive rigging of the elections held in March 1977, was not within the contemplation of the 1973 Constitution, and in order that the fresh elections might be construed as being the first General Elections under that Constitution, certain amendments had to be made in the Constitution, as was agreed to between the former Prime Minister Mr. Z. A. Bhutto and the leaders of the Pakistan National Alliance, and that accordingly it became necessary for the President of Pakistan to issue certain Post-Proclamation Orders to make provision for these forthcoming General Elections, and the appointment of the Acting Chief Justice of the Lahore High Court as the Chief Election Commissioner for this purpose was, therefore, in the nature of an extra-constitutional appointment, justified by necessity, and intended only for achieving the most important objective of Martial Law, namely the early restoration of democratic institutions in the country. He argued that, in the circumstances, it would be unrealistic to hold that the provisions of Article 216, were attracted to such a temporary and adhoc appointment. He stated that it was common knowledge that the name of Mr. Justice Mushtaq Hussain had been suggested for appointment as Chief Election Commissioner on account of the high reputation enjoyed by him for integrity and impartiality.

Article 216 of the Constitution is in the following terms:

“216. Commissioner not to hold office of profit.

- (1) The Commissioner shall not
 - (a) hold any other office of profit in the service of Pakistan; or
 - (b) occupy any other position carrying the right to remuneration for the rendering of services.

- (2) A person who has held office as Commissioner shall not hold any office of profit in the service of Pakistan before the expiration of two years after he has ceased to hold that office:

Provided that

- (a) this clause shall not be construed as preventing a person who was a Judge of the Supreme Court or of a High Court immediately before his appointment as a Commissioner from resuming his duties as such Judge on the expiration of his term as Commissioner; and
- (b) a person who has held office as Commissioner may, with the concurrence of both Houses, be reappointed to that office before the expiration of two years after he has ceased to hold that office.”

It will be seen that the plain meaning of these provisions is that the Chief Election Commissioner is not permitted to hold any other office of profit in the service of Pakistan or to occupy any other position carrying the right to remuneration for the rendering of service. The proviso (a) to clause (2) of the Article, however, makes it possible for the Chief Election Commissioner on the expiration of his term to resume his duties as a Judge of the Supreme Court or of a High Court, if he was such Judge immediately before his appointment as Chief Election Commissioner. This proviso clearly means, by necessary implication, that during his term as Chief Election Commissioner, he is not permitted to function as a Judge a position which is in accord with the prohibition contained in clause (1) of the article. If this proviso had not been included in Article 216, a serious question would then have arisen whether a serving Judge could resume his judicial functions within two years of his ceasing to be Chief Election Commissioner in view of the prohibition contained in clause (2) of this article; and it could also be argued, on the basis of the decision of this Court in *Abrar Hassan's* case, already referred to, that the Judge concerned had ceased to hold his judgeship owing to his having accepted another substantive and permanent appointment as Chief Election Commissioner. While expressing the opinion that by his appointment as permanent Chief Election Commissioner a Judge of the High Court does not cease to be a Judge, the learned Judges in the High Court have obviously not adverted to this judgment.

Mr. Yahya Bakhtiar seems to us to be right in contending that the provisions contained in Article 207 are not absolutely identical with those contained in Article 216, as sub-clause (a) of clause (1) of Article 207 prohibits a Judge of the Supreme Court or of a High Court from holding any other office of profit in the service of Pakistan if his remuneration is thereby increased, but sub-clause (a) of clause (1) of Article 216 does not contain any such condition regarding increase in remuneration; it simply prohibits the holding of any other office of profit by the Chief Election Commissioner. This different phraseology

was the reason for this Court holding in Abrar Hasan's case that a Judge of the High Court or of the Supreme Court could undertake another temporary assignment or office provided his remuneration was not thereby increased; but there is no such relaxation in the case of the Chief Election Commissioner. The two cases referred to by the High Court, namely, Rao Mohammad Ishfaq Khan *vs.* Mr. Justice Mushtaq Hussain, etc. W. P. No. 2141 of 1964 and Malik Ghulam Jilani *vs.* Mr. Justice Muhammad Gul (1) were of Judges undertaking temporary assignments as Law Secretary to the Federal Government of Pakistan, and not of different permanent and substantive appointments. In the latter case, the Judges concerned would have been deemed to have ceased to hold their judicial office.

Clause (2) of Article 207 prohibits a Judge from holding any office of profit in the service of Pakistan before the expiration of two years after he has ceased to hold that office, but this prohibition is not to apply to a judicial or quasi-judicial office or the office of the Chief Election Commissioner or of Chairman or Member of a Law Commission or of Chairman or Member of the Council of Islamic Ideology. A similar prohibition is contained in clause (2) of Article 216 of the Constitution in respect of a person who has held office as Chief Election Commissioner, but the two provisions are not identical. In the case of the Chief Election Commissioner, the prohibition against holding any office of profit in the service of Pakistan before the expiration of two years is subject only to two exceptions, namely, that this clause shall not be construed as preventing such a person from resuming his duties as a Judge of the Supreme Court or of a High Court if he was a Judge of either of these Courts before his appointment as Chief Election Commissioner; and his term of office may be extended by both Houses of Parliament. It will be noticed that a person ceasing to be a Chief Election Commissioner is not permitted to hold any of the several offices which find mention in clause (2) of Article 207 of the Constitution. It is not, therefore, correct to say that in this respect both the Articles are identical; there are indeed significant differences as pointed out above.

As a result, we are of the view that Article 216 of the Constitution does indeed prohibit the Chief Election Commissioner, during the continuance of his office as such, from holding any other office of profit in the service of Pakistan; or occupying any other position carrying a right to remuneration for the rendering of services. This prohibition also applies to the performance of judicial functions by a person who is a serving Judge of the Supreme Court or of a High Court at the time of his appointment as Chief Election Commissioner. However, by virtue of the special saving clause contained in proviso (a) to clause (2) Article 216 such a person may resume his judicial functions on the expiration of his term as Chief Election Commissioner. It is also clear that the disability imposed by Article 216 of the Constitution applies to a person holding the permanent and substantive appointment of the Chief Election Commissioner for the term or terms specified

in Article 215(1) read with proviso (b) to clause (2) of Article 216 of the Constitution, the aggregate of which may amount to a period of seven years. The disability or prohibition does not apply to an acting appointment made under Article 217 of the Constitution which provision permits the simultaneous performance of judicial functions by a Judge of the Supreme Court appointed as Acting Chief Election Commissioner. Finally as Article 216 is in the nature of constitutional prohibition, it is to be strictly construed in the sense that it shall apply only to a permanent and substantive appointment made in terms of the Constitution, and for the purpose of holding elections there under, and cannot be extended by analogy to an appointment not falling in this category.

Now, the question is whether the appointment of the learned Acting Chief Justice of the Lahore High Court as the Chief Election Commissioner is an appointment falling within the relevant Articles of the Constitution?

In order to appreciate the respective contentions of the learned counsel for the parties in this behalf, a brief reference to the various Presidential Orders relating to the forthcoming elections would appear to be useful. It has already been stated that Mr. Justice Mushtaq Hussain had been appointed as the Acting Chief Justice of the Lahore High Court with effect from the 13th of July 1977. He was appointed as the Chief Election Commissioner with effect from the 17th of July 1977, and has also continued since then to function as the Acting Chief Justice of the High Court. Before entering upon the office of the Chief Election Commissioner, he was required under the Chief Election Commissioner (Oath of Office) Order, 1977, (President's Post Proclamation) Order No. 3 of 1977 to make an oath before the Chief Justice of Pakistan. The duties and functions of the Chief Election Commissioner thus appointed were, however, spelt out a week later on the 23rd of July 1977 by the promulgation of Election Commission Order, 1977 [President's Post Proclamation) Order No. 4 of 1977]. By clause (2) of Article 1 of this Order it was provided that it shall be deemed to have taken effect on the 5th day of July 1977. By the retrospective application of this Order, the appointment of Mr. Justice Mushtaq Hussain as the Chief Election Commissioner a week earlier thus placed on a regular footing in terms of Article 2 of this Order.

The various provisions contained in these Orders mark a significant departure from the corresponding provisions contained in the Constitution dealing with the subject of elections. Some of the salient features falling in this category are:-

- (i) Whereas under Article 215 of the Constitution the Chief Election Commissioner is to hold office for a term of three years, which term may be extended for one year by the National Assembly under the proviso to this Article, and the Chief Election Commissioner may be re-appointed

for a second term of three years by both Houses of Parliament under the proviso to Article 216, the Chief Election Commissioner under Post Proclamation Order No. 4 of 1977 is to be appointed only for “the forthcoming general elections”. The extension of his duties under the recently promulgated Martial Law Order No. 25 of 1977 does not in any manner alter the essential purpose and character of this appointment;

- (ii) Under Article 218 of the Constitution an Election Commission consisting of the Chief Election Commissioner and two serving Judges of the High Court is to be constituted for the purpose of each General Election to the National Assembly and to a Provincial Assembly, whereas under Post Proclamation Order No. 1. :he Election Commission is to consist of the Chief Election Commissioner and four Members, each of whom shall be a Judge of the Supreme Court or of a High Court; and
- (iii) The dissolution of the National and the Provincial Assemblies having been effected under the Proclamation of the 5th of July, 1977, and not under Articles 58 and 112 respectively, the forthcoming elections do not fall within the ambit of clause (2) of Article 224 of the Constitution, but under the special terms of the Post Proclamation Order No. 5 of 1977.

It was conceded by Mr. Yahya Bakhtiar that the forthcoming general elections could not be held without an amendment of the Constitution, and that, in fact, such an amendment was contemplated in the Draft Accord between the former Prime Minister and PNA Leadership. He, however, submitted that as Article 24 of Post Proclamation Order No. 5 contemplates that the forthcoming elections to be held under this Order shall be deemed to have been held under the Constitution, therefore all the provisions and prohibitions contained in Chapter I of Part VIII of the Constitution relating to the holding of elections, including the provisions of Article 216, should apply to the forthcoming elections. He contended that this part of the Constitution had not been held in abeyance by the Proclamation of the 5th of July, 1977. He further submitted that even otherwise Article 4 of Post Proclamation Order No. 4 of 1977 itself provides for the appointment of an Acting Chief Election Commissioner in terms similar to those contained in Article 217 of the Constitution, thus making it clear that the appointment of Mr. Justice Mushtaq Hussain, as the Chief Election Commissioner, is a substantive and permanent appointment even though made under Post Proclamation Order No. 4 of 1977.

It will be seen that from a perusal of the Post Proclamation Order No. 5 of 1977 read with Post Proclamation Order No. 4 of 1977, it becomes abundantly clear that the forthcoming elections are not covered by any provision of the 1973 Constitution; nor, indeed, could they be so covered as the situation arising in March, 1977, in the wake of wide-spread allegations of massive rigging of the elections, was an unprecedented situation not within the contemplation of the

Constitution. It was, therefore, necessary to make special provision for new elections, and the Post Proclamation Order No. 5 of 1977 rightly recites that these provisions were being made “in an endeavor to restore the principles of democracy where under the State of Pakistan exercises its power and authority through the chosen representatives of the people.” It is in the same spirit that Article 24 of this Order lays down that the elections held under this Order shall be deemed to have been held under the Constitution and shall have effect accordingly. Without this deeming provision, the resulting Legislatures could not function under the 1973 Constitution, but to our mind the deeming provision contained in Article 24 of this Order, cannot attract, in terms, the provisions contained in Chapter I of Part VIII of the Constitution relating to elections, as the elections are, in fact, not being held under that Chapter. The deeming clause is to come into operation only after the elections have been held and the Prime Minister, etc., have been elected. We have already observed that the disability or prohibition contained in Article 216 of the Constitution cannot be extended by analogy to an appointment not falling within the ambit of the Constitution.

It is true that Article 4 of Post Proclamation Order No. 4 of 1977 provides for the appointment of an Acting Chief Election Commissioner, in case the office of the Chief Election Commissioner falls vacant or he is unable to perform his duties owing to absence or any other cause, but it does not follow from this provision that the Chief Election Commissioner appointed under this Order must be regarded as being in the nature of a substantive and permanent incumbent of the office under Article 215 of the Constitution. In order to fulfill that requirement the other conditions prescribed in the Constitution itself should also be present, but as already noticed they are not. It is not difficult to appreciate that even a temporary appointee of an office may vacate his office, or be otherwise unable to perform its functions, thus necessitating an acting appointment in his place. The provision contained in Article 4 of the Post Proclamation Order No. 4 does not, therefore, support the proposition that the appointment of Mr. Justice Mushtaq Hussain is a regular and permanent appointment falling within the ambit of the Constitution.

While Mr. Yahya Bakhtiar submitted that Chapter I of Part VIII of the Constitution relating to the holding of elections had not been held in abeyance by the Proclamation of the 5th of July, 1977, the learned Attorney-General contended that it being ancillary to the Chapters relating to the legislative organs of the State, it should also be deemed to have been held in abeyance owing to the dissolution of the National and Provincial Legislatures. We consider that for the purposes of the present controversy it is not necessary to decide this question as we have already found that the forthcoming general elections are, in any case, not being held in terms of the Constitution, but are only deemed to be so after they have been held and the new Legislatures have come into existence, so that the working

of democratic institutions may be restored under the Constitution. On this view of the matter nothing turns on this point.

We may now examine the next contention raised by Mr. Yahya Bakhtiar, namely, that it was not at all necessary for the President of Pakistan or the Chief Martial Law Administrator to issue the various Post Proclamation Orders to make special provision for the holding of the forthcoming elections or to vary the terms of appointment of the Chief Election Commissioner, as all these matters stood fully provided for in Chapter I of Part VIII of the Constitution; and that these Orders clearly fall outside the purview of the powers enjoyed by the Chief Martial Law Administrator, as laid down by this Court in Begum Nusrat Bhutto's case. He submitted that by departing from the provisions of the Constitution as contained in Articles 213, 215 and 216 of the Constitution, these Orders have had the effect of imparting the independence of the Chief Election Commissioner as well as of the Lahore High Court, by combining two offices in one person. He questioned the wisdom of increasing the number of Members of the Election Commission from two to four, and suggested that the Court ought to rule that this increase was not necessary.

Before dealing with these submissions on merits, it seems necessary to observe that there is apparently a misconception in the mind of the learned counsel as to the true implications of the decision of this Court in Begum Nusrat Bhutto's case, in so far as it deals with the powers of the Chief Martial Law Administrator under the doctrine of necessity. On page 716 of the printed report this Court has stated as under:

“That the Chief Martial Law Administrator, having validly assumed power by means of an extra-constitutional step in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity, namely:

- (a) All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it;
- (b) All acts which tend to advance or promote the good of the people;
- (c) All acts required to be done for the ordinary orderly running of the State; and
- (d) All such measures as would establish or lead to the establishment of the declared objectives of the proclamation of Martial Law, namely, restoration of law and order, and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution.”

These categories of the various types of permissible actions were spelt out after a review of the leading authorities on the doctrine of necessity which purported to lay down that such actions would be construed or deemed to be necessary in the interest of the welfare of the people and the State. The reason underlying such a view obviously is that once an extra-Constitutional action or intervention is validated on the ground of State or civil necessity, then, as a logical corollary it follows that the new Regime or Administration must be permitted, in the public interest, not only to run the day-to-day affairs of the country, but also to work towards the achievement of the objectives on the basis of which its intervention has earned validation. In other words, if it can be shown that the impugned action reasonably falls within one or the other of the enumerated categories, then it must be construed as being necessary and thus held valid under the law of necessity. The word “necessity” has, therefore, come to be used in this context as a term of art, having a certain constitutional and legal connotation as distinct from its ordinary dictionary meaning.

It is also necessary to state that, as pointed out by this Court in a slightly different context in the case of *Mir Abdul Baqi Baluch v. The Government of Pakistan (1)*, “under a constitutional system which provides for a judicial review of an executive action, it is a fallacy to think that such a judicial review must be in the nature of an appeal against the decision of the executive authority. It is not the purpose of a judicial authority reviewing executive actions to sit in appeal over the executive, or to substitute the discretion of the Court for that of the administrative agency. What the Court is concerned with is to see that the executive or administrative authority had before it sufficient material upon which a reasonable person could have come to the conclusion that the requirements of law were satisfied.” We may add that the material in question may either be provided by the authority whose action is challenged, or it may be such of which the Court can take judicial notice, as was done by this Court in the recent case of *Begun Nusrat Bhutto*.

As to what is reasonable and what is not, the observations made by Hamoodur Rahman, J. (as he then was) in the case of *Abul A’la Maudoodi vs. The Government of West Pakistan (1)*, provide a useful guide, namely:

“But what is the test that the Courts are to apply in determining what is or is not reasonable. Obviously this cannot depend upon the notions of reasonableness of individual Judges, for, one Judge may well regard that as reasonable which another regards as unreasonable. Nor is the opinion of the Legislature conclusive on this question. The reasonableness must, of course, be judged by the standards of an ordinary prudent and reasonable citizen Reasonable is itself a relative term. What is unreasonable in one given set of circumstances may well be reasonable in another set of

circumstances.”

It seems to us, therefore, that it must be clearly understood that in judging whether an action taken by the President or the Chief Martial Law Administrator is valid under the law of necessity, the Court is not to sit in appeal over the executive or legislative authority concerned, nor substitute its own discretion for that of the competent authority. The responsibility for the relevant action, its methodology and procedural details, must rest on that authority. In exercising its power of judicial review the Court is concerned with examining whether the impugned action reasonably falls within any of the categories enumerated by this Court in Begum Nusrat Bhutto’s case, while spelling out the powers which may be exercised by the Chief Martial Law Administrator, or the President of Pakistan acting on his advice. As to what is reasonable or not in this context must be judged by the standards of an ordinary, prudent and reasonable citizen, and will depend on the prevailing circumstances and the object with which the action has been taken. These observations are, of course, without derogation to the other accepted principles governing the exercise of powers conferred by Article 199 of the Constitution.

Viewed in this perspective, the Post Proclamation Presidential Orders Nos. 3, 4 and 5 clearly fall within the objectives for which Martial Law was imposed in the country on the 5th of July, 1977, to ensure the restoration of democratic institutions under the Constitution. As the Constitution, unfortunately, does not contain any provisions for meeting the unprecedented situation which we are considering here, the President, on the advice of the Chief Martial Law Administrator, was clearly not only competent, but also under a solemn obligation, to take steps to ensure fresh elections. In these circumstances, it is not for the Court to substitute its own opinion as to the arrangements necessary to be made in this behalf; all that the Court is to examine is whether the contemplated measures reasonably fall within the objective in question. We have already said enough to show that the three Presidential Orders in question are directly intended to achieve one of the most important objectives of the imposition of Martial Law. Their validity cannot, therefore, be questioned on the ground that they are not necessary. The Court would be traversing outside the scope of the powers of judicial review in dictating to the Government the procedural and administrative details necessary for the holding of the forthcoming election such as the number of Members of the Election Commission.

A half-hearted submission was made by Mr. Yahya Bakhtiar, toward, the conclusion of his arguments, that the permanent Chief Justice, Mr. Justice Aslam Riaz Hussain, had not been validly appointed as the Acting Governor of the Punjab, as the Notification issued by the Cabinet Division, in this behalf, shows that the appointment was made by the Chief Martial Law Administrator and not

by the President of Pakistan as required by clause (1) of Article 101 of the Constitution. He was, however, unable to show as to what was the hearing of this argument on the controversy before us, Irrespective of whether Mr. Justice Aslam Riaz Hussain has, or has not been validly appointed, as the Acting Governor of the Punjab, the fact remains that he is no longer performing the duties of the office of the Chief Justice of the Lahore High Court, this rendering it necessary for an Acting Chief Justice to be appointed either in terms of Article 196 of the Constitution or under Post Proclamation Order No. 2 of 1977.

The contention that the appointment of the Chief Justice as Acting Governor was not justified or necessary is misconceived. This was a measure which could be taken under the Constitution, and therefore within the purview of powers available to the Chief Martial Law Administrator. It may also be mentioned that even in the past Chief Justices of High Courts have been appointed Acting Governors in the Provinces of the Punjab, Sindh and N.W.F.P.

From what we have said above, it follows that the appointment of Mr. Justice Mushtaq Hussain as the Chief Election Commissioner is in the nature of a temporary and ad hoc appointment in a situation not covered or contemplated by the Constitution of 1973. It is not a permanent and substantive appointment in terms of the Constitution, but is merely intended for the limited purpose of holding the forthcoming general elections, notwithstanding the fact that certain other duties or powers may also have been conferred on him. It is, therefore not an appointment to which the prohibition contained in Article 216 of the Constitution can be attracted. Accordingly, there is no bar in the way of the Chief Election Commissioner continuing to perform his judicial functions as a Judge and Acting Chief Justice of the Lahore High Court.

The appeal, therefore, fails and is hereby dismissed.

Before concluding, a word might be said about the contention that the combination of the two offices in question in one person is likely to affect his independence in either or both these capacities. The contentions as well as the apprehension underlying it are unfounded. Even the Constitution of 1973, by its Article 217, permits a serving Judge of the Supreme Court to be appointed as the Acting Chief Election Commissioner, thereby showing that the makers of the Constitution did not entertain any apprehension that a temporary responsibility of this nature was likely to adversely affect the independence of such Judge in either capacity. Similarly, Article 218 of the Constitution provides that two serving Judges of the High Court shall act as Members of the Commission for the purpose of holding a general election. There is no provision that during such membership they would cease to function as Judges of the High Court. We can also take judicial notice of the fact that in the past Chief Justices or Judges of the

High Courts have been appointed to undertake the work of delimitation of electoral constituencies in addition to their judicial functions. Serving Judges have also been called upon to work as Election Tribunals. The apprehension expressed by Mr. Yahya Bakhtiar is, therefore misplaced.

Appeal dismissed.

Syed Anwarul Haq
Chief Justice