

IN THE SUPREME COURT OF PAKISTAN

(ORIGINAL JURISDICTION)

PRESENT:

Mr.Justice Sh.Riaz Ahmed, HCJ
Mr.Justice Munir A.Sheikh
Mr.Justice Iftikhar Muhammad Chaudhry
Mr.Justice Qazi Muhammad Farooq
Mr.Justice Mian Muhammad Ajmal
Mr.Justice Syed Deedar Hussain Shah
Mr.Justice Hamid Ali Mirza
Mr.Justice Abdul Hameed Dogar
Mr.Justice Muhammad Nawaz Abbasi

CONSTITUTION PETITION NO.15 OF 2002

Qazi Hussain Ahmed, Ameer Jamaat-e-Islami Pakistan
Mansoor, Multan Road, Lahore

PETITIONER

VERSUS

General Pervez Musharraf, Chief Executive & another

RESPONDENTS

CONSTITUTION PETITION NO.17 OF 2002

High Court Bar Association Rawalpindi

PETITIONER

VERSUS

General Pervez Musharraf, Chief Executive & others

RESPONDENTS

CONSTITUTION PETITION NO.18 OF 2002

Supreme Court Bar Association of Pakistan

PETITIONER

VERSUS

General Pervez Musharraf,
Chief of the Army Staff & Chief Executive & others

RESPONDENTS

CONSTITUTION PETITION NO.19 OF 2002

Nawabzada Nasrullah Khan, President,
Alliance for Restoration of Democracy

PETITIONER

VERSUS

The Federation of Pakistan through Secretary to the
Government of Pakistan Establishment Division, Islamabad & others

RESPONDENTS

CONSTITUTION PETITION NO.20 OF 2002

Shahid Orakzai

PETITIONER

VERSUS

General Pervez Musharraf, President of Pakistan & others

RESPONDENTS

CONSTITUTION PETITION NO.21 OF 2002

Adal Trust through its Managing Trustee
Shaikh Mushtaq Ali, Advocate & another

VERSUS
General Pervez Musharraf, Chief Executive of Pakistan & others

PETITIONERS

CONSTITUTION PETITION NO.22 OF 2002

Syed Zafar Ali Shah

RESPONDENTS

PETITIONER

VERSUS
General Pervaiz Mushraf, Chief Executive & others

RESPONDENTS

CONSTITUTION PETITION NO.23 OF 2002

Engr.Muhammad Saleem Ullah Khan President,
Jamiat Ulema-e-Pakistan (Nifaze Shariat) Lahore

PETITIONER

VERSUS
Federation of Pakistan through Secretary
Establishment Division, Islamabad & others

RESPONDENTS

CONSTITUTION PETITION NO.24 OF 2002

Wasim Rehan

PETITIONER

VERSUS
General Pervaiz Mushraf, Chief Executive of Pakistan

RESPONDENT

CIVIL PETITION NO.512 OF 2002

Awami Himayat Tehrik (Pakistan) Through its Founder Chairman
Moulvie Syed Iqbal Haider

PETITIONER

VERSUS
Federation of Pakistan through Secretary Ministry of Law,
Justice and H.R. Division Govt. of Pakistan, Islamabad

RESPONDENT

For the petitioner :

(CP 15/2002)

- Dr.Farooq Hasan, Sr.ASC
- Rai Muhammad Nawaz Kharal, ASC
- Mr.Ejaz Muhammad Khan, AOR

For the petitioner :

(CP 17/2002)

- Mr.Muhammad Ikram Ch., ASC
- Ch.Muhammad Akram, AOR

For the petitioner :

(CP 18/2002)

- Mr.Hamid Khan, ASC
- Mr.Ejaz Ahmed Khan, AOR (absent)

For the petitioner :

(CP 19/2002)

- Syed Sharif Hussain Bokhari, ASC
- Syed Abul Aasim Jafri, AOR (absent)

For the petitioner

(CP 20/2002)

- In person

For the petitioner

(CP 21/2002)

- In person

For the petitioner

(CP 22/2002)

- Mr.A.K.Dogar, ASC
- Mr.Ejaz Muhammad Khan, AOR

For the petitioner

(CP 23/2002)

- Mr.Hashmat Ali Habib, ASC
- Mr.M.S.Khattak, AOR

For the petitioner

(CP 24/2002)

- In person

For the petitioner

(CP 512/02)

- In person

- Mr.Makhdoom Ali Khan, Attorney General for Pakistan

On Court notice

- Mr.Amir Hani Muslim, DAG
- Mr.Muhammad Ashraf Tanoli, Advocate General, Balochistan

- Syed Sharifuddin Pirzada, Sr.ASC

For respondents/Federation

(In CP 15/02)

- Mr.Maqbool Ellahi Malik, Sr.ASC
- Mr.Nisar Ahmed, AS
- Rana Waqar Ahmed, Advocate with
- Mr.Mehr Khan Malik, AOR

For respondents/Federation

**(In CP 17, 21, 23,
24 & 512/02)**

- Mr.Maqbool Ellahi Malik, Sr.ASC
- Mr.Mehr Khan Malik, AOR

For respondents/Federation

(In CP 18/02)

- Syed Iftikhar Hussain Gillani, ASC
assisted by Mr.Muneeb Zia, Adv.
- Mr.Mehr Khan Malik, AOR

For respondents/Federation

(In CP 19 & 22/02)

- Mr.Abdul Hafeez Pirzada, Sr.ASC
- Mr.Mehr Khan Malik, AOR

For respondents/Federation

**(In CP 20/02)
Date of hearing**

- Mr.Mehr Khan Malik, AOR
- 22-4-2002 to 27-4-2002
-

SHORT ORDER

SH. RIAZ AHMED, C.J. - On account of the extraordinary situation, which prevailed on 12th October 1999, General Pervez Musharraf, Chief of Army Staff and Chairman, Joint Chiefs of Staff Committee, through an extra-constitutional measure took over the government and the affairs of the country.

2. On 14th October 1999, Proclamation of Emergency was issued, which had to take effect from 12th October 1999. The said Proclamation of Emergency reads as under: -

“PROCLAMATION OF EMERGENCY”

“In pursuance of deliberations and decisions of Chiefs of Staff of the Armed Forces and Corps Commanders of Pakistan Army, I, General Pervez Musharraf, Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff proclaim Emergency throughout Pakistan and assume the office of the Chief Executive of the Islamic Republic of Pakistan.

“I hereby order and proclaim as follows:

- (a) The Constitution of the Islamic Republic of Pakistan shall remain in abeyance;
- (b) The President of Pakistan shall continue in office;
- (c) The National Assembly, the Provincial Assemblies and Senate shall stand suspended;
- (d) The Chairman and Deputy Chairman of the Senate the Speaker and Deputy Speaker of the National Assembly and the Provincial Assemblies shall stand suspended;
- (e) The Prime Minister, the Federal Ministers, Ministers of State, Advisors to the Prime Minister, Parliamentary Secretaries, the Provincial Governors, the Provincial Chief Ministers, the Provincial Ministers and the Advisors to the

Chief Ministers shall cease to hold office;

(f) The whole of Pakistan will come under the control of the Armed Forces of Pakistan.

This Proclamation shall come into force at once and be deemed to have taken effect on and 12th day of October, 1999.”

3. On the same day, i.e. 14th of October 1999, the Provisional Constitution Order No. 1 of 1999 was issued, which reads as follows: -

PROVISIONAL CONSTITUTION ORDER NO. 1 OF 1999

“In pursuance of Proclamation of the 14th day of October, 1999, and in exercise of all powers enabling him in that behalf, the Chairman Joint Chiefs of Staff Committee and Chief of Army Staff and Chief Executive of the Islamic Republic of Pakistan under the Proclamation of Emergency of 14th October 1999 (hereinafter referred to as the Chief Executive) is pleased to make and promulgate the following Order-

1. (1) This Order may be called Provisional Constitution Order No. 1 of 1999.
(2) It extends to the whole of Pakistan.
(3) It shall come into force at once.
2. (1) Notwithstanding the abeyance of the provisions of the Constitution of the Islamic Republic of Pakistan, hereinafter referred to as the Constitution, Pakistan shall, subject to this Order and any other Orders made by the Chief Executive, be governed, as nearly as may be, in accordance with the Constitution.

(2) Subject as aforesaid, all courts in existence immediately before the Commencement of this Order shall continue to function and to exercise their respective powers and jurisdiction:

Provided that the Supreme Court or High Courts and any other court shall not have the powers to make any order against the

Chief Executive or any person exercising powers or jurisdiction under his authority.

(3) The Fundamental rights conferred by Chapter 1 of Part II of the Constitution, not in conflict with the Proclamation of Emergency or any Order made thereunder from time to time shall continue to be in force.

3. (1) The President shall act on, and in accordance, with the advice of the Chief Executive.

(2) The Governor of a Province shall act on, and in accordance with the instructions of the Chief Executive.

4. (1) No Court, tribunal or other authority shall call or permit to be called in question the Proclamation of Emergency of 14th day of October, 1999 or any Order made in pursuance thereof.

(2) No judgement, decree, writ, order or process whatsoever shall be made or issued by any court or tribunal against the Chief Executive or any authority designated by the Chief Executive.

5. (1) Notwithstanding the abeyance of the provisions of the Constitution, but subject to the Orders of the Chief Executive all laws other than the Constitution, all Ordinances, Orders, Rules, Bye laws, Regulations, Notifications and other legal instruments in force in any part of Pakistan whether made by the President or the Governor of a Province, shall be inserted and shall be deemed to have always been so inserted, shall continue in force until altered, amended or repealed by the Chief Executive or any authority designated by him.

(2) In all laws including all Acts, Ordinances, Orders, Rules, Bye-laws, Regulations, Notifications and all other legal instruments in force in any part of Pakistan, whether made by the President or the Governor of a Province, the words, "Prime Minister", and the words, "Chief Minister", wherever occurring, shall be deemed substituted by the words, "Chief Executive of the Islamic Republic of Pakistan", and "Governor" respectively.

5A. (1) An Ordinance promulgated by the President or by the

Governor of a Province shall not be subject to the limitation as to its duration prescribed in the Constitution.

- (2) The provisions of Clause (1) shall also apply to an Ordinance issued by the President or by the Governor, which was in force immediately before the commencement of the proclamation Order of Chief Executive of the Fourteenth day of October 1999.

Subject to the Proclamation Order of the Chief Executive of the Fourteenth day of October, 1999 and the provisions of the Provisional Constitution Order No. 1 of 1999 as amended, the President of the Islamic Republic of Pakistan on the advice of the Chief Executive, and the Governor of the Province on instructions of the Chief Executive, may issue and promulgate Ordinances which shall not be subject to the limitation as to their duration prescribed in the Constitution.

6. The Proclamation of Emergency issued on 28th day of May 1998, shall continue but subject to the provisions of Proclamation of Emergency dated 14th day of October 1999 and this Provisional Constitution Order and any other Order made thereunder.

7. All persons who, immediately before the commencement of this Order, were in the service of Pakistan as defined in Article 260 of the Constitution and those persons who immediately before such commencement were in office as Judge of the Supreme Court, the Federal Shariat Court or a High Court or Auditor-General or Ombudsman and Chief Ehtesab Commissioner, shall continue in the said service on the same terms and conditions and shall enjoy the same privileges, if any.”

4. It is pertinent to mention that Mr. Muhammad Rafiq Tarar, the former President of Pakistan continued in office under the Provisional Constitution Order No. 1 of 1999. On 20th June, 2001 the Chief Executive issued Chief Executive’s Order No. 2 of 2001 in pursuance of the Proclamation of Emergency (Amendment) Order, 2001. It came into force at once. It substituted clause (b) of para (2) of the Proclamation of Emergency of the fourteenth day of October 1999. Clause (b) reads as follows: -

- (b) ‘The person holding the office of the President of the

Islamic Republic of Pakistan immediately before the commencement of the Proclamation of Emergency (Amendment) Order, 2001, shall cease to hold the office with immediate effect.

Under the same Order, in clause (c) of para (2) *ibid*, the word, ‘suspended’ was substituted with the words, ‘dissolved with immediate effect’. Clause (d) of para (2) *ibid*. was substituted as under: -

(d) The Chairman and Deputy Chairman of the Senate have already ceased to hold office; the Speaker and Deputy Speaker of the National Assembly and the Provincial Assemblies shall also cease to hold office with immediate effect.

5. On the same day, i.e. the 20th of June, 2001, the Chief Executive issued Chief Executive’s Order No. 3 of 2001 and the Preamble to the said Order read that “whereas it is expedient to provide for succession to the office of the President of the Islamic Republic of Pakistan and for matters connected therewith or ancillary thereto; Now, therefore, in pursuance of the Proclamation of Emergency of the fourteenth day of October 1999 and the Provisional Constitution Order 1 of 1999 and in exercise of all powers enabling him in that behalf, the Chief Executive of the Islamic Republic of Pakistan is pleased to make and promulgate the said Order”. It provided that the Order shall have effect notwithstanding anything contained in the Constitution or any other law. Under para 3(1), it was provided that upon the office of the President becoming vacant for any reason whatsoever, the Chief Executive of the Islamic Republic of Pakistan shall be the President of the Islamic Republic of Pakistan and shall perform all functions assigned to the President by or under the Constitution or by or under any law. It was further provided that the Chief Executive shall hold office as President until his successor enters upon his office.

6. The taking over of the government by General Pervez Musharraf,

Proclamation of Emergency of the 14th day of October, 1999 and Provisional Constitution Order No. 1 of 1999 as amended, were challenged before this Court under Article 184 (3) of the Constitution through several petitions, which were disposed of by means of the Short Order dated 12th May 2000 passed in the case reported as Syed Zafar Ali Shah v. General Pervez Musharraf, Chief Executive of Pakistan (PLD 2000 SC 869). It was held by this Court that on 12th October 1999 a situation arose for which the Constitution provided no solution and intervention by the Armed Forces through an extra-Constitutional measure became inevitable and the said act was validated on the basis of the doctrine of state necessity and the principle *salus populi suprema lex* as embodied in Begum Nusrat Bhutto's case (PLD 1977 SC 657). It was further held that the 1973 Constitution still remains supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of state necessity. The operative part of the Short Order reads as follows: -

“We accordingly hold as under:-

“6.(i) That General Pervez Musharraf, Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff through Proclamation of Emergency dated the 14th October, 1999, followed by PCO 1 of 1999, whereby he has been described as Chief Executive, 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 as enumerated hereinafter, 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 Chief Executive.

(ii) That constitutional amendments by the Chief Executive can be resorted to only if the Constitution fails to provide a solution for attainment of his declared objectives and further that the power to amend the Constitution by virtue of clause 6 sub-clause (i) (a) *ibid* is controlled by sub-clauses (b)(c) and (d) in the same clause.

(iii) That no amendment shall be made in the salient features of the Constitution i.e. independence of Judiciary, federalism, parliamentary form of government blended with Islamic provisions.

(iv) That Fundamental Rights provided in Part II, Chapter I of the Constitution shall continue to hold the field but the State will be authorized to make any law or take any executive action in deviation of Articles 15, 16, 17, 18, 19 and 24 as contemplated by Article 233 (1) of the Constitution, keeping in view the language of Articles 10, 23 and 25 thereof.

(v) That these acts, or any of them, may be performed or carried out by means of orders issued by the Chief Executive or through Ordinances on his advice;

(vi) That the Superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces, if challenged, in the light of the principles underlying the law of State necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or authority acting on his behalf.

(vii) That the courts are not merely to determine whether there exists any nexus between the orders made, proceedings taken and acts done by the Chief Executive or by any authority or person acting on his behalf, and his declared objectives as spelt out from his speeches dated 13th and 17th October, 1999, on the touchstone of State necessity but such orders made, proceedings taken and acts done including the legislative

measures, shall also be subject to judicial review by the superior courts.”

7. On 9th April 2002, the Chief Executive and the President of Pakistan issued Chief Executive’s Order No. 12 of 2002 (hereinafter called the Referendum Order). Articles 3 and 4 of the Referendum Order provide as follows: -

“3. Referendum.- (1) There shall be a referendum on the 30th day of April 2002, in which every citizen of Pakistan who has attained the age of eighteen years on the date of referendum and possess a National Identity Card issued under the National Database and Registration Authority Ordinance, 2000 (VIII of 2000), shall be eligible to vote at the referendum:

Provided that where a National Identity Card under the National Database and Registration Authority Ordinance, 2000 (VIII of 2000) has not been issued, but he is in possession of an identity card validly issued under section 5 of the National Registration Act, 1973 (LVI of 1973), (since repealed), he shall be eligible to cast his vote on the basis of such identity card.

(2) For the purpose of this referendum, the whole of Pakistan shall be a single constituency and every voter shall be entitled to vote at a polling station of his choice regardless of his place of residence.

(3) The question for referendum shall be as set out in the First Schedule on the ballot paper in Urdu;

Provided that in the Province of Sindh, the Commission shall provide a ballot paper printed in Sindhi or in Urdu as demanded by the voter.

(3) The question shall be answered in either “yes” or no” by affixing the stamp provided by the Commission approximately in the appropriate circle printed on the ballot paper.

(4) The procedure for holding the referendum shall be as provided in the Second Schedule.

4. Consequence of the result of referendum.- (1) Notwithstanding anything contained in the Constitution or any law for the time being in force, if the majority of the votes cast in the referendum are in the affirmative, the people of Pakistan shall be deemed to have given the democratic mandate to General Pervez Musharraf to serve the nation as President of Pakistan for a period of five years to enable him, inter alia, to consolidate the reforms and the reconstruction of institutions of State for the establishment of genuine and sustainable democracy, including the entrenchment of the local government system, to ensure continued good governance for the welfare of the people, and to combat extremism and

sectarianism for the security of the State and the tranquillity of society.

(2) The period of five years referred in clause (1) shall be computed from the first meeting of the Majlis-e-Shoora (Parliament) to be elected as a result of the forthcoming general election to be held in October, 2002, in accordance with the Judgment of the Supreme Court.”

8. The above Constitution Petitions have been filed in this Court under Article 184 (3) of the Constitution challenging the legality and *vires* of the Referendum Order on the constitutional plane as well as on the touchstone of the verdict of this Court in Syed Zafar Ali Shah's case. Dr. Farooq Hasan, learned ASC appearing in support of Constitution Petition No. 15/2002 vehemently contended that despite the validation of the Proclamation of Emergency and the Provisional Constitution Order No. 1 of 1999, the 1973 Constitution still remains the supreme law of the land as laid down in Syed Zafar Ali Shah's case and the powers of the present government are strictly circumscribed in the aforesaid case. According to the learned counsel, at present the grund norm of the country being the 1973 Constitution and the judgment of this Court in Syed Zafar Ali Shah's case, the *vires* of the Referendum Order have to be examined on the touchstone of the relevant provisions of the Constitution as well as the law laid down in Syed Zafar Ali Shah's case. In all these petitions, a common prayer has been made that the Referendum Order be declared illegal, *ultra vires* the Constitution and violative of the law laid down in Syed Zafar Ali Shah's case.

9. In Constitution Petition No. 15/2002 filed by Qazi Hussain Ahmed, Amir Jamaat-i-Islami and Constitution Petition No. 22/2002 filed by Syed Zafar Ali Shah's case Ali Shah, a composite declaration has been sought to the effect: -

- That the Chief Executive has unlawfully occupied and taken over the position of the President of the Islamic Republic of Pakistan in violation of the judgment of this Court in Syed Zafar Ali Shah's case;

- That Mr. Muhammad Rafiq Tarar still continues to be the President notwithstanding the Chief Executive's Order 3 of 2001;
- That writ in the nature of *quo warranto* be issued against the Chief Executive; and
- That the holding of referendum for election to the office of the President be declared illegal, unconstitutional and violative of the judgment of this Court in *Syed Zafar Ali Shah's case*.

10. Syed Sharifuddin Pirzada, Sr. ASC, Mr. Abdul Hafeez Pirzada, Sr. ASC and Syed Iftikhar Hussain Gillani, ASC, learned counsel appearing on behalf of the Federation and Mr. Makhdoom Ali Khan, learned Attorney General for Pakistan appearing on Court's notice, have urged the following points: -

(i) The controversy raised in these petitions has to be looked into with reference to a long history of the constitutional crises Pakistan has been going through ever since its coming into existence and the ground realities prevailing in the country particularly in the aftermath of the events of 12th October 1999, as recognized and validated by this Court in *Syed Zafar Ali Shah's case*;

(ii) General Pervez Musharraf is firmly committed to and bound by the direction of this Court given in *Syed Zafar Ali Shah's case* regarding holding of elections in October 2002, which is clearly established not only from his statements within and outside the country, but also from the provisions of Article 4 (2) of the Referendum Order;

(iii) The holding of elections in October 2002 as promised and reiterated before this Court by the learned counsel for the Federation and the learned Attorney General for Pakistan is a step in aid of the transition or the transformation as it would lead to the road towards democracy and rebuilding the institutions of the State, which is a great need of the hour;

(iv) Transition and transformation of an extra-constitutional set up into a democratic dispensation is the most troubled path and the gap cannot just be covered with one jump;

(v) General Pervez Musharraf, ever since the assumption of power, has been performing his functions and duties in accordance with the mandate given to him by this Court in Syed Zafar Ali Shah's case and has been striving to transform the Army rule into a democratic set up as envisaged in the aforesaid case;

(vi) It has been explicitly stated in the Preamble to the Referendum Order that it has been made and promulgated in pursuance of the Proclamation of Emergency of the 14th day of October 1999 and the PCO No. 1 of 1999 and in exercise of all other powers enabling the Chief Executive and President of the Islamic Republic of Pakistan in that behalf.;

(vii) In the peculiar constitutional history of Pakistan, referendum is a valid means of election to the office of President in Pakistan. It has also been resorted to in various other countries for the purpose. Referendum is nothing but an appeal to the people of Pakistan, who are the political sovereign of the country;

(viii) Nexus between the law, i.e. the Referendum Order and the objects intended to be achieved through it, i.e. the declared objectives of the Chief Executives and transition and transformation to the democratic set up is clearly established in the present case. The Preamble to the Referendum Order, *inter alia*, provides as under: -

AND WHEREAS, since at that juncture the institutions of State stood seriously weakened and the democratic and moral authority of the government of the day stood gravely eroded, the Chief Executive of Pakistan announced a 7 – Point Agenda on 17th October 1999, stating his objectives to rebuild national confidence and morale; strengthen the Federation, remove inter-provincial disharmony and restore national cohesion; revive the

economy and restore investor confidence; ensure law and order and dispense speedy justice; depoliticize state institution; devolution of power to the grass roots level; and ensure swift and across the board accountability;

AND WHEREAS the Chief Executive of Pakistan has emphasised that, inter alia, appropriate measures will be taken for good governance, economic revival, poverty alleviation and political restructuring;

AND WHEREAS it is imperative to consolidate the measures taken by the Chief Executive of Pakistan for the reconstruction of the institution of state for establishing genuine and sustainable democracy to ensure good governance for an irreversible transfer of power to the people of Pakistan;

AND WHEREAS it is essential to combat extremism and sectarianism for the security of the State and tranquillity of society;

AND WHEREAS it is in the supreme national interest to obtain a democratic mandate from the people of Pakistan through referendum for General Pervez Musharraf to continue to be the President of Pakistan.”

(ix) The reform agenda launched by the Chief Executive, being in the interest, welfare and prosperity of the people of Pakistan, its achievement and continuity are essential for the public good.

(x) The Referendum Order does not, in any manner, derogate from the parameters of the extra-constitutional measure validated by this Court in Syed Zafar Ali Shah's case nor does it tantamount to converting the parliamentary system envisaged under the Constitution into presidential form of government in view of the fact that elections to the National and Provincial Assemblies and the Senate of Pakistan would be held in October 2002 in accordance with the constitutional scheme and governments at the federal and provincial levels would be formed accordingly. The Referendum Order is *intra vires* the powers given to the Chief Executive by means of the judgment of this Court in Syed Zafar Ali Shah's case;

(xi) The Referendum Order has not the effect of amending the 1973 Constitution, therefore, its legality and vires cannot be examined on the touchstone of the verdict of this Court in Syed Zafar Ali Shah's case and the constitutional provisions relating to holding of referendum;

(xii) Mr. Muhammad Rafiq Tarar cannot be deemed to be continuing to hold the office of the President of the Islamic Republic of Pakistan and the relief in the nature of issuance of writ of *quo warranto* prayed for in Constitution Petitions No. 15 and 22 of 2002 and against the assumption of office of President by General Pervez Musharraf under Chief Executive's Order No. 3 of 2001, cannot be granted in these proceedings for the following reasons: -

- (a) The outgoing President continued in office under the PCO 1 of 1999 and was part of the present government for nearly less than two years;
- (b) He had been performing the functions and duties of the office of President on and in accordance with the advice of the Chief Executive of Pakistan under the new dispensation and was a party to various legislative and executive actions of the present government;
- (c) He did not launch any protest when he ceased to hold office;
- (d) After he ceased to hold the office of President, he accepted the retirement benefits of that office and thus acquiesced in his ceasing to hold the office;
- (e) The petition suffers from *laches* inasmuch as the former President left the office on 20th June 2001 whereas Qazi Hussain Ahmed filed Constitution Petition No. 15/2002 in this Court on 2nd April 2002, i.e. after a lapse of about 10 months;
- (f) The issuance of writ of *quo warranto* is discretionary in nature and as held in *Sabir Ali Shah's case* (PLD 1994 SC 738), such a writ cannot be issued in collateral proceedings.

In view of the peculiar facts and circumstances of the present case, we are not persuaded to hold that a case for issuing the writ of *quo warranto* prayed for in Constitution Petitions No. 15 and 22 of 2002 has been made out. We, therefore, hold that the Chief Executive's Orders No. 2 and 3 of 2001 have been validly issued by the Chief Executive of Pakistan in exercise of his powers under the Proclamation of Emergency of the 14th day of October 1999 and the Provisional Constitution Order No. 1 of 1999 as validated by this Court in *Syed Zafar Ali Shah's case*. Consequently, these petitions *qua* the issuance of writ of *quo warranto* are dismissed.

12. As far as the legal status of the Referendum Order is concerned, suffice it to say that it has been issued by the Chief Executive and the President of the Islamic Republic of Pakistan in exercise of the powers conferred upon him by this Court in *Syed Zafar Ali Shah's case* while validating the Proclamation of Emergency of the 14th day of October 1999 and the Provisional Constitution Order No. 1 of 1999 and it has rightly been conceded by the learned counsel for the respondents that the said Order does not have the effect of amending the Constitution of Pakistan.

13. As regards the grounds of challenge to the consequences flowing from the holding of referendum under the Referendum Order, apparently these questions are purely academic, hypothetical and presumptive in nature and are not capable of being determined at this juncture. Accordingly, we would not like to go into these questions at this stage and leave the same to be determined at a proper forum at the appropriate time. Since no relief can be granted in these proceedings at this stage, the Constitution Petitions are disposed of being premature.

14. In view of our findings in the above petitions, no order is required to be passed in Civil Petition for Leave to Appeal No. 512/2002, which is disposed of accordingly.

CHIEF JUSTICE

JUDGE

JUDGE

JUDGE

JUDGE

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JUDGE

JUDGE

JUDGE

Announced in open on 27-4-2002

at Islamabad.

CHIEF JUSTICE
