IN THE SUPREME COURT OF PAKISTAN
(ORIGINAL JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE FAISAL ARAB

CONSTITUTION PETITION NO.36 OF 2016

(Under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973)

Muhammad Hanif Abbasi

... Petitioner

VERSUS

Jahangir Khan Tareen and others

... Respondents

...

For the Petitioner	:	Mr. Muhammad Akram Sheikh, Sr. ASC Mr. Azid Nafees, ASC *(Assisted by Ms. Gulalay Zeb and Ms. Maham Ahmed, Advocates)* Syed Rifaqat Hussain Shah, AOR
For Respondent No.1	:	Mr. Sikandar Bashir Mohmand, ASC *(Assisted by Syed Zulqarnain Safdar, Advocate)* Mr. Tariq Aziz, AOR
For Respondent No.2	:	Mr. Muhammad Waqar Rana, Additional Attorney General for Pakistan Mr. M. S. Khattak, AOR
For Respondent No.3	:	Mr. Hamid Ali Shah, ASC Mr. Mehr Khan Malik, AOR
For Election Commission of Pakistan	:	Raja M. Ibrahim Satti, Sr. ASC Raja M. Rizwan Ibrahim Satti, ASC Mr. M. Arshad, D.G. (Law), ECP Malik Mujtaba Ahmed, Addl.D.G.(Law) ECP
On Court's notice	:	Mr. Ashtar Ausaf Ali, Attorney General for Pakistan
Dates of Hearing	:	3.5.2017, 4.5.2017, 8.5.2017, 9.5.2017, 10.5.2017, 11.5.2017, 23.5.2017, 24.5.2017, 25.5.2017, 30.5.2017, 31.5.2017, 1.6.2017, 13.6.2017, 14.6.2017, 11.7.2017, 13.7.2017, 25.7.2017, 26.7.2017, 27.7.2017, 31.7.2017, 1.8.2017, 2.8.2017, 3.8.2017, 12.9.2017, 26.9.2017, 28.9.2017, 3.10.2017, 4.10.2017, 5.10.2017, 10.10.2017, 11.10.2017, 12.10.2017, 17.10.2017, 18.10.2017, 19.10.2017, 23.10.2017, 24.10.2017, 25.10.2017, 7.11.2017, 8.11.2017, 9.11.2017 and 14.11.2017

...

JUDGMENT

MIAN SAQIB NISAR, CJ.- Honesty is one of the greatest virtues in a man. Where in an otherwise honest and upright society, the nation and the State, which are governed by the Constitution and the rule of law; if the affairs of the Government come to be entrusted to dishonest persons such a nation soon loses its way. Government does not mean the executive limb of the State alone, but it includes the Legislature and the Judiciary. The States which are not governed by honest and upright people are bound to suffer and lag behind the developed nations of the world, and, therefore, it is of utmost importance that the State structure must be built upon honesty of purpose by honest people. It is in this context that we have to judge and determine the people in power who are running the affairs of State, as to whether they are honest in general terms and specifically as the chosen representatives of the people, whether they qualify in terms of the true spirit and test of Article 62(1)(f) of the Constitution of the Islamic Republic of Pakistan, 1973 *(the Constitution)*.

2. The petitioner is a prominent member of Pakistan Muslim League (Nawaz) *[PML(N)]*, the ruling party at the center. Respondent No.1 *(the respondent)* is the General Secretary of Pakistan Tehreek-e-Insaaf *(PTI)*, the second majority party in opposition at the center. In the by-elections held on 23.12.2015, the Respondent was elected as a member of the National Assembly from NA-154 Lodhran on the PTI ticket. Vide instant petition under Article 184(3) of the Constitution the petitioner seeks the disqualification of the respondent from being a member of the National Assembly on the basis of the provisions of Article 62(1)(f) and 63(1)(n) of the Constitution on the grounds that he is not honest and further, has got his bank loans written off. It may be relevant to mention here that

the learned counsel for the petitioner at the start of his submissions, when questioned by the Court, unequivocally admitted that the instant petition is primarily in the nature of a **quo-warranto**. We may also like to point out that the learned counsel for the respondent raised a **preliminary objection** qua the maintainability of this petition on account of the fact that in view of the Panama leaks, Mr. Imran Khan Niazi, Chairman of PTI, filed a similar petition *[Article 184(3)]* against Mian Muhammad Nawaz Sharif, the Prime Minister of Pakistan *[who belongs to PML(N)]*, seeking his disqualification as a member of the National Assembly on the touchstone of the Article *ibid* with the consequential relief that he should cease to be the Prime Minister of Pakistan. This petition has been allowed by this Court vide judgment dated 28.7.2017. It was during the pendency of the said petition that the present cause was initiated by the petitioner. The preliminary objection is dealt with as below.

PRELIMINARY OBJECTION:

3. The objection in this behalf is not to the effect that this Court lacks jurisdiction under Article 184(3) of the Constitution to take cognizance and to issue a writ of **quo-warranto** in appropriate cases or such a petition in law is not maintainable against the members of the Parliament or Provincial Assembly(ies) when the question of their qualification or disqualification to hold the membership is involved or has been assailed. It is also not proposed that the respondent is not the holder of a **public office**. Instead the precise contention of the learned counsel for the respondent is that the relief in **quo-warranto** proceedings is purely discretionary in nature and should not be granted as a matter of right or course: rather the *bona fides*, the object, the motive of the relator should be examined and if it is found that the action arises from

ulterior motives, that it is for the benefit and advantage of someone else; then it is not initiated in the public interest and the relief should be refused for such reasons. In this context it is argued that the petition is a counterblast to the petition filed by Mr. Imran Khan, Chairman PTI against Mian Mohammad Nawaz Sharif etc. It is urged that though the name of the respondent does not appear in the Panama Leaks, yet in the memo of the petition it is falsely alleged to be so, which the respondent has clearly denounced not only through public statements, but also while responding to the notice of the income tax authorities. This misstatement of fact on the part of the petitioner has cast serious doubt upon his *bona fides* and by itself is sufficient to disallow this petition. Learned counsel for the respondent in support of his plea has relied upon the judgments reported as **Dr. Kamal Hussain and 7 others Vs. Muhammad Sirajul Islamabad and others (PLD 1969 SC 42 at page 51)**, **Azizur Rahman Chowdhury Vs. M. Nasiruddin etc. (PLD 1965 SC 236)**, **Dr. Azim-ur-Rehman Khan Meo Vs. Government of Sindh and another (2004 SCMR 1299)** and **Makhdoom Ghulam Ali Shah Vs. Election Commission of Pakistan, Islamabad through Secretary and 4 others (2008 CLC 738)**. There can be no cavil with the principle that to grant the relief in the nature of **quo-warranto** is within the discretionary power of the superior Courts, it should not be allowed as a matter of course, rather the conduct and the *bona fides* of the relator, the cause and the object of filing such petition is of considerable importance and should be examined; it should be ascertained if the petition has been filed with some *mala fide* intent or ulterior motive and to serve the purpose of someone else. We are of the considered view that **quo-warranto** remedy should not be allowed to be a tool in the hands of the relators, who approach the Court with *mala fide* intentions and either have their own personal grudges and scores to settle with the holder of

the public office or are a proxy for someone else who has a similar object or motive. This remedy surely cannot be allowed to serve as a sword hanging over the heads of the Parliamentarians *(members of the Provincial Assemblies)* who are the chosen representatives of the people under the mandate of the Constitution *(Article 2A) "wherein the State shall exercise its power and authority through the chosen representatives of the people"*. Thus, Parliament is the supreme law making organ of the State; it is the supreme body to lay down the State policies. And the executive body of the State is also derived from this organ. Although the validity of legislative enactments of the Parliament, and the executive actions of the Administration *(Note: which has genesis in the Parliament)* are subject to the power of judicial review of the superior courts, this power should be exercised within the limits provided by the Constitution, as interpreted by the courts and the various principles of law enunciated in this behalf. Yet the sanctity of the Parliament and the Parliamentarian should not be allowed to be impinged or compromised lightly. The remedy of **quo-warranto** should not be permitted to be resorted to for demeaning, intimidating and causing undue harassment to the Parliamentarians. It should not be allowed to be used as a pressure tactic for purposes of restraining them from performing their functions and discharging their duties in accordance with the Constitution and the law. This remedy of **quo-warranto** cannot be equated with the challenge to the holder of any other public office, which public office is statutory in nature or of an autonomous body; where the appointment is assailed as not having been made according to the law *(regarding his qualifications etc.)* or on account of the fact that the appointing authority lacked the authority to make such an appointment or the appointment is tainted with sheer *mala fide*s, on the basis of political considerations, nepotism etc. and/or in utter absence and misuse of authority. The courts should not lose sight of the fact that

the Parliamentarians as mentioned above are the elected representatives of the people and have come to the Parliament through a democratic process. Democracy is one of the basic features of the Constitution and the courts being the guardians and custodians of the Constitution are obliged to protect and safeguard the same. This relief *(remedy)* should not be allowed as a matter of course, the more so when the candidature of a candidate is duly scrutinized at the time of the scrutiny of his/her nomination papers to ascertain whether he is qualified or disqualified in terms of the Constitution and the law. Furthermore, after the election, his election can be challenged *inter alia* on the grounds of lack of qualification or disqualification before the Election Tribunal in accordance with the procedure provided by law the Representation of People Act, 1976 *(ROPA)*. The bar contained in Article 225 of the Constitution in this regard as well is another reason for using this remedy with care and circumspection. We would not like to go further into the details of the said bar. But we are clear in our mind and view that **quo-warranto** writ can only be issued by the Court against the Parliamentarians *(members of the Provincial Assemblies)* in exceptional cases. And the cases of the Parliamentarians cannot be considered to be at par with the holders of any other public office. In the cases of Parliamentarians, the lack of qualification and disqualification is inherent in nature and if he *(an unqualified or disqualified Parliamentarian)* is allowed to stay as a member of the Parliament, he cannot be said to be the true and real representative of the people of his constituency as he lacks those inherent qualities and he cannot be allowed to perform his functions and discharge his duties as a trustee for the people whom he represents. Besides, it would be against the mandate of the qualifications and disqualifications provided by the Constitution and the law, which command has to be followed and given due effect by the courts in letter

and spirit. Corruption, and anything done with dishonesty of purpose is the antithesis of honesty. And we have no doubt in our mind that the expression "honest" used in Article 62(1)(f) of the Constitution bears a close relation to preventing the scourge of corruption. Corruption can destroy the very fabric of the State. Thus the power of **quo-warranto** in relation to the Parliamentarians can be validly exercised by the courts if the disqualification attributed to them has direct and close nexus to corruption, because an act of dishonesty shall be covered by the Article *supra*. Thus for such reasons the *bona fide* and the conduct of the relator is quite significant. But at the same time the most important aspect is whether from the grounds set out in the petition a *prima facie* serious case, falling within the purview of **quo-warranto** jurisdiction, is made out. Therefore, if the grounds on the face of it are frivolous, baseless and vexatious and/or on the same grounds the election of the returned candidate was earlier challenged in appropriate proceedings before the Election Tribunal, but the plea(s) was rejected; then coupled with the conduct of the petitioner, the Court is not required to go into the merits of the case and should summarily dismiss the petition on the basis of lack of *bona fides* and extraneous motives of the petitioner and on account of the petition being frivolous. However, where on the consideration of the contents of the petition and the relevant record, the court forms an opinion that there is some substance to the matter, then, simply on account of the fact that some doubt can possibly be cast upon the conduct of the petitioner, the court shall not dismiss the petition summarily, rather it shall hear and decide the matter on merits, obviously not losing sight of the *bona fides* of the relator even then. We have examined the pleadings of the parties in this case; heard lengthy arguments of the counsel for the parties for weeks. We have considered serious points of law and facts which could reflect upon the

qualification/disqualification of the respondent. Therefore regardless of our final opinion on merit, we are unable to agree that only because the petitioner is a member of PML(N) and some petition against the leader of his party head has been filed by the party head of PTI and that this petition is subsequent in time, therefore, it lacks *bona fide* or is a counterblast **or** as it is inaccurately stated in the petition that the name of the respondent appears in the Panama Papers, whereas it is not so, it should be dismissed on that account. Especially when from the contents of the concise statement of the respondent it appears that there exists an off-shore company which has genesis in the respondent. And the ground in this behalf and the other grounds too are worthy of consideration at the very least. Therefore, the preliminary objection in the facts and circumstances has no force and is hereby rejected.

ON MERITS:

4. Attending to the merits of the case, the learned counsel for the petitioner has provided to the Court his formulations in writing. These as agreed by both the sides are the propositions involved in the matter with some counter propositions submitted by the respondent's counsel which are in the nature of a reply. And the learned counsels for the parties have made their submissions accordingly. However, in order to keep our opinion concise and to avoid repetition, we shall be making reference to the key submissions made by the learned counsel for the parties; whereas their elaborate contentions/arguments/counter arguments shall be adequately reflected in the reasons of this judgment. These formulations/propositions are reproduced as the headings of our opinion thereupon.

INSIDER TRADING (Proposition No.1):

(That Securities and Exchange Commission of Pakistan issued a show cause notice to Respondent No. 1 thereby accusing him of the offences of insider trading and acts and

omissions lacking fiduciary behavior, whereupon Respondent No. 1 admitted commission of such offences and deposited the gains accrued from insider trading to SECP and also paid the fine for the offences for lack of fiduciary duty along with reimbursing the legal costs of SECP thus making him not qualified to contest the election of, or being, a member of Parliament by virtue of the provisions of Article 62(1)(f) of the Constitution of Islamic Republic of Pakistan.)

5. The gist of the submissions of the learned counsel for the petitioner on the noted proposition are:- that the respondent being a Director of JDW Sugar Mills Ltd. was aware of the fact that the said company is going to *(purchase majority shares)* take over United Sugar Mills Ltd. *(USML)*. In order to achieve undue advantage of this exclusive and sensitive information, the respondent admittedly was involved in insider trading and purchased the shares of USML during November, 2004 to November, 2005, through his front men Haji Khan and Allah Yar who were his Gardener and Cook respectively; hence besides the violation of other laws mentioned in the SECP's letter dated 3.12.2007 he has violated the provisions of Sections 15-A, 15-B and 15-E of the Securities and Exchange Ordinance, 1969 *(Ordinance, 1969)*. Through this insider trading, the respondent made a gain of Rs.70.811 million by selling USML shares after its takeover by JDW Sugar Mills Ltd. by *(through)* public offer. In this context proceedings against the respondent under Section 217 of the Companies Ordinance, 1984 *(Ordinance, 1984)* and Section 15-A etc. of the Ordinance, 1969 and some other laws were initiated by the SECP, he was served with a show cause notice/letter dated 3.12.2007 with respect to the afore-mentioned violation of the relevant laws which was also a criminal offence under Section 15-B. As the respondent was guilty of such violations and commission of offence by him, therefore, in his reply to the show cause notice dated 8.12.2007 he admitted to the commission of the violations/offences referred to above and in unequivocal terms offered to return the unlawful gain of Rs.70.811 million along with other penalties/fines. Besides, through the

SECP's letter dated 11.1.2008 in addition to the amount gained, respondent was asked to pay the requisite penalties/fines imposed upon him under the law and the legal costs of the SECP of Rs.1 million. This direction was complied with by the respondent who while admitting his liability returned the aforesaid amount of Rs.72.067 million as demanded by the SECP *vide* bank draft dated 14.1.2008 ***(emphasis supplied by us)***. Thus he has committed the offence of insider trading as mandated by Section **15-E** of the Ordinance, 1969 and violated other law(s), therefore, on account of the above act/offence the respondent is not honest and *ameen* in terms of Article 62(1)(f) of the Constitution and Section 99 of the ROPA. In response to the above, learned counsel for the respondent has taken the plea that neither any show cause notice was issued to the respondent nor any proceedings were initiated and concluded against him under the aforecited provision of law. The respondent though admits *(admitted)* the issuance of the letter dated 3.12.2007 by SECP, his reply thereto dated 8.12.2007; the final letter of the SECP dated 11.1.2008 and also the deposit of gained amount along with the penalties etc. and the legal cost as demanded by the SECP, yet it is argued that the respondent had not made any **admission** or **confession** in fact or law for having committed an offence or violation, rather as he wanted to settle the matter and get rid of this irritant, therefore, he decided to pay off the amount as demanded by the SECP. A bare perusal of respondent's reply dated 8.12.2007 reveals that it was conspicuously marked as "**without prejudice**" and was concluded by underscoring that *"this letter may not be used as evidence in any legal or quasi legal civil or criminal proceedings"*. It is the respondent's case that he had not committed any wrongful act, rather acted in good faith in purchasing the shares through his employees. No admission or confession, express or implied, can be attributed to the respondent on account of the contents of his reply or by virtue of paying

the demanded amount to the SECP. It is also submitted that the letter dated 8.12.2007 to the SECP, **underscored** that there are sound legal defenses of the alleged irregularities. Moreover, the SECP in its reply dated 11.1.2008 to the respondent concluded that the SECP had not made any determination of fact or law as regards the allegations and that the matter stood disposed of with no further action. It is submitted that the above is a past and closed transaction and in exercise of its jurisdiction under Article 184(3) of the Constitution, when the petitioner is seeking issuance of a quo-warranto, this Court will not reopen a matter which relates to 7 years prior to the filing of his nomination papers in 2015 on the basis of which he got elected. Besides, the counsel for the respondent has made reference to *(respondent's)* supplementary concise statement CMA No.3675/2017 and in line thereof, in his oral submissions has also challenged the *vires* of the provisions of Sections 15-A and 15-B on the ground that such provisions were introduced and incorporated into the Ordinance, 1969 through Section 7(5) of the Finance Act, 1995 *(Act No.1 of 1995)* dated 2.7.1995. These provisions were subsequently substituted by entirely new Sections i.e. 15-A to 15-E through Section 6(2) of the Finance Act, 2008 dated 27.6.2008. Section 15-E has been additionally impugned on the ground that it was not in force at the time when the alleged violation/offence was committed by the respondent or even when the letter dated 3.12.2007 was issued to him or when he settled the matter with the SECP by making the payments, on the contrary as the section came into force later it would have no retrospective application, therefore, it is absolutely misconceived and baseless to allege in the petition that the respondent has committed an offence under the section *(15-E ibid)*. The subject matter of the above provisions introduced through both the Finance Acts are *ex-facie* outside the parameter, scope and ambit of a Money Bill as provided for in Article

73(2) of the Constitution as, *inter alia*, none of the aforementioned provisions relate to the imposition, abolition, remission, alteration or regulation of any tax or any matter incidental thereto or any of the matters expressly stipulated in Article 73(2) *(ibid)*. It is thus argued that the aforesaid provisions are *ultra vires* to the constitutional provisions of Article 70(2) *ab initio* and no action against the respondent either earlier or even now in these proceedings can be founded and based thereupon. In the context of the above, learned counsel for the respondent has placed reliance upon the judgments of this Court passed in **Sindh High Court Bar Association through its Secretary and another Vs. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 SC 879)** and **Workers' Welfare Funds, M/o Human Resource Development, Islamabad through Secretary and others Vs. East Pakistan Chrome Tannery (Pvt.) Ltd. through G.M. (Finance), Lahore and others (PLD 2017 SC 28)**. He has also relied upon the provisions of Article 4 of the Constitution to argue, that it is the inalienable right of the respondent to be treated in accordance with law. And such law is the one which is validly made by the Legislature. In the context of the above submission and facts, three questions require the attention of and resolution by this Court under the captioned proposition: **(1)** whether the respondent being guilty of insider trading, the matter in this regards was investigated against him in terms of Section 15-A of the Ordinance, 1969 and he was proceeded and prosecuted under Section 15-B thereof and was duly convicted and punished by the competent authority; **(2)** whether the respondent by virtue of his letter dated 8.12.2007 and also by paying off the amount demanded by the SECP has admitted/confessed to the commission of offence of insider trading and violation of other laws mentioned in the letter of the SECP dated 3.12.2007 and irrespective of

the fact that no action was taken against him by the competent authority at the relevant point of time, he should in these quo-warranto proceedings under Article 184(3) of the Constitution be declared as dishonest within the purview of Article 62(1)(f) of the Constitution; **(3)** whether the provisions of Sections 15-A, 15-B and 15-E of Ordinance, 1969 are *ultra vires* of the Constitution and thus void *ab initio* and *non-est* and therefore no offence of insider trading could be based thereupon against the respondent. The last proposition raises an ancillary question; whether the *vires* of such law can be attacked in these collateral proceedings. Before proceeding to attend and answer the questions it is expedient to mention that admittedly the respondent at the relevant point of time was the Director of JDW Sugar Mills Ltd. and we have little doubt in our mind that in principle a decision had been taken by the management of the JDW Sugar Mills Ltd. to take over USML. This can be validly inferred from the circumstances mentioned below. It is spelt out from the record that the respondent was acting on behalf of JDW Sugar Mills Ltd. in negotiating for such takeover. The persons named in the notice of the SECP, namely, Haji Khan and Allah Yar are admittedly the employees of the respondent and when questioned, the learned counsel for the respondent states that they are in his employment since the last 24 years and looking after his household/farm affairs meaning thereby that they were the persons worthy of the respondent's trust and confidence. The respondent intended to hide these transactions, therefore, the shares were not directly purchased by him or in the name of any of his close relative. It is also not denied that an amount of Rs.41.970 million was paid by the respondent for the purchase of USML shares and the said employees had no means of their own to pay such a substantial amount. It is further not disputed that these shares were finally sold by the respondent and it is he who made a gain of Rs.70.811

million. Thus for all intents and purposes the above-named two employees *(employees on nominal salaries)* were simply the *benamidars,* rather front men of the respondent and the transaction(s) were decidedly dubious, and conducted in a clandestine manner. At that point of time the respondent was the Federal Minister in the Government of Pakistan i.e. from August, 2004 to November, 2007 and was a holder of a high public position and office at the Federal level. He should perhaps have exercised greater care and diligence in the exercise of his fiduciary duties as Director of JDW Sugar Mills Ltd. rather than engaging in the purchase of USML in breach of such fiduciary duty in a clandestine manner as stated above. However, it is the case of the respondent that full disclosure was made to all the Board Members of JDW Sugar Mills Ltd. who were either close family members or otherwise closely connected persons. But it is never avowed that the sellers of the shares were also informed of the fact of such takeover. Besides, this is only a verbal assertion of the respondent not supported by any minutes of the Board of Directors of JDW Sugar Mills Ltd. that such disclosure was duly made. It is not controverted that the increase of the respondent's shareholding in USML on account of such purchases increased to 10.6% and that the requisite disclosure was not made in terms of Section 222 of the Ordinance, 1984 and Section 4 of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002. Thus from these admitted facts the probability cannot be ruled out that if the respondent had decided to contest the matter, besides the liability of paying back the gained amount and the penalties and the fines, the respondent would have faced prosecution under the relevant law which may well have resulted in his conviction and punishment. Therefore he was left with no choice except to save his position and avoid the predicament in which he was caught by paying back the gained amount

and the penalties/fines and to save himself from the criminal prosecution. The learned counsel for the respondent has not been able to satisfy us as to what could be a valid defence of his client in fact and law and that he was not guilty of insider trading and the violations of laws. Be that as it may, the question before us is whether the matter was investigated according to law and the action for insider trading was taken against the respondent by the competent authority and whether he was convicted and punished for the criminal offence or in other words whether the matter was taken to its logical legal conclusion. The ancillary and equally important aspect of the case is whether the respondent has admitted to having committed the offence and violation of law coupled with the admitted position that he has paid the entire amount gained from the sale of shares and also paid the penalties and fine and the legal fee as demanded by the SECP, though ultimately no action under the law was taken by it *(the SECP)* against him and thus on the basis of such an admission, should he be declared to be dishonest under Article 62(1)(f) of the Constitution in the instant proceedings? Because from the provisions of Sections 15-A and 15-B of the Ordinance, 1969 and the relevant provisions of other law(s), in view of certain admitted facts of the case as mentioned above, it is emphatically reiterated that the probability that if proceeded against and prosecuted the respondent might have been convicted and punished in the criminal action initiated against him cannot be ruled out. Besides, he has admitted/acknowledged his civil liability in unequivocal terms not only in the reply but also by making the payments to the SECP which is a further proof that the purchase of the USML shares was a clear case of insider trading by the respondent. Be that as it may, we cannot ignore the settled law that the criminal liability of a person is not determined on the rule of probability, but on the proof of the facts which constitute an

offence and that too by a court of competent jurisdiction, which in such a case was the court not inferior to the court of Sessions under Section 25 of the Ordinance, 1969 and such court could only take the cognizance on the report of an authorized officer of the SECP, or if the conviction was based upon a confession made by the respondent before such court having jurisdiction. But the admitted position on the record is that the respondent was never prosecuted under the said law nor was he ever convicted and punished by the court. In the circumstances we do not find ourselves conferred with any jurisdiction in these proceedings to prosecute the respondent and to convict and punish him now. The other part of respondent's liability is civil in nature. The petitioner on the basis of certain facts which are not in dispute wants this Court to declare the respondent guilty of dishonesty. And in this behalf the petitioner has relied heavily upon the admissions made by the respondent in his reply dated 8.12.2007 coupled with the fact that he made the payment of the entire amount of gain and the fine and penalties as imposed by the SECP. Thus it is advantageous to reproduce the whole correspondence exchanged between the SECP and the respondent. The letter dated 3.12.2007 of the SECP reads as under:-

"SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

PRIVATE AND CONFIDENTIAL

No.CLD/EMD/32/2006/513 *December 3, 2007*

Mr. Jahangir Khan Tareen,
Director,
JDW Sugar Mills Ltd,
17-Abid Majeed Road, Lahore Cantt.,
Lahore.

Sub: ***Investigation into the acquisition of United Sugar Mills ("USML") by JDW Sugar Mills Ltd. ("JDW")***

Dear Sir,

We refer to our various recent meetings and correspondence in the matter in the context of the captioned investigation initiated by the Commission under Section 29(1) of the Securities and Exchange Commission of Pakistan Act, 1997, in relation to the acquisition of USML by JDW. The investigation was initiated vide Commission's Order dated December 12, 2006 pursuant to the unusual trading pattern and price movement in the share of USML from November, 2004 to November 2005. The investigation revealed that being a Director of JDW and having knowledge of JDW negotiating for the acquisition of a majority stake in USML, during the period January 17, 2005 to March 16, 2005 you acquired 316,780 share of USML (constituting 10.6% of the total issued capital of USML) through Messrs Haji Khan and Allah Yar. Subsequently by August 19, 2005, your shareholding in USML was increased to 336,680 shares (constituting 11.23% of the total issued capital of USML). Thereafter, when JDW acquired USML, you made a gain of Rs.70.811 million through sale of your shareholding in USML, under the public offer made by JDW pursuant to the provisions of law.

(emphasis supplied by us)

Prima facie, it appears that there are potential violations of certain applicable laws in relation to the purchase of the above shares in USML as stated hereunder:

1. *Section 15A of the Securities & Exchange Ordinance, 1969 ("SEO 1969")*

   Under Section 15A of the SEO 1969 insider trading is prohibited. Being a Director of JDW, you had in your knowledge information regarding the possible acquisition of USML. Hence your purchase of shares of USML appears to have been made with a view to making a gain which you made in the sum of Rs.70.811 million (pursuant to the public offer made by JDW).

2. *Section 4 of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers), Ordinance, 2002 ("Takeovers Ordinance")*

Section 4 of the Takeovers Ordinance requires that any person acquiring more than 10% share of a listed company must make disclosure to the said company and to the stock exchange.

Accordingly on March 16, 2005, when your shareholding in USML reached 10.6% i.e. crossed the 10% reporting requirement, you were required to make disclosure.

3. *Section 214 and 216 of the Companies Ordinance, 1984 ("Companies Ordinance")*

Under Section 214 of the Companies Ordinance, any director concerned or interest in any contract or arrangement entered or to be entered into by the company shall disclose his interest and under Section 216, the said director should not take part in any discussion or vote on the issue.

It appears that despite the above requirements of disclosure of your interest in USML to the Board of Directors of JDW as required under the aforementioned section of the Companies Ordinance, no such disclosure was made and you also participated and voted in favour of the acquisition of JDW in the relevant Board meetings.

4. *Section 222 of the Companies Ordinance*

Section 222 of the Companies Ordinance provides that any person who is directly or indirectly the beneficial owner of more than 10% shares in the company shall submit a return in the prescribed form to the Registrar Companies and the Commission.

On March 15, 2005, when your shareholding reached 10.6% i.e. had crossed the 10% threshold, you were required to file a statement of beneficial ownership with the Commission as envisaged under Section 222 of the Companies Ordinance.

In the above background, you are required to prove us with your clarifications/explanations as regards the above four issues within 10 days of receipt of this letter.

_____
TAHIR MAHMOOD
Executive Director Enforcement"

Respondent replied to this letter on 8.12.2007. The contents whereof read as under:-

"PRIVATE AND CONFIDENTIAL

WITHOUT PREJUDICE

Date: 8 December 2007

Mr. Tahir Mahmood
Executive Director Enforcement
Securities and Exchange Commission of Pakistan
NIC Building, Jinnah Avenue
Islamabad.

Dear Sir,

I refer to the Securities and Exchange Commission of Pakistan's ("SECP") letter dated December 3, 2007, bearing reference no. CLD/EMD/32/20061513, in relation to SECP's investigation with respect to various transactions undertaken during the course of the year 2005 regarding the purchase, sale and subsequent surrender of the share of United Sugar Mills Limited ("USML") in response to the public offer of JDW Sugar Mills Limited ("JDW"). AS part of the investigation SECP had earlier issued various notices/letters to JDW of which I am a director, seeking information and clarifications, which we had provided. The matter related to alleged violations of Sections 214 and 216 of the Companies Ordinance, 1984 ("1984 Ordinance") attracting Section 217 of the 1984 Ordinance and Section 15A of the Securities and Exchange Ordinance 1969 ("SE Ordinance"), attracting Section 15B of the SE Ordinance, non-disclosure attracting section 4 of the Listed Companies (Substantial Acquisition of Voting, Shares and Takeovers) Ordinance, 2002 (the "Takeover Ordinance 2002") and non-filing of the return of

beneficial ownership in terms of Section 222 of the 1984 Ordinance.

During the course of the investigation, certain meetings were also held between various officials of the SECP and myself, along with my representatives. I had the opportunity to examine the details of the various transactions undertaken on my behalf and would like to state that although there might have occurred certain inadvertent irregularities in relation to the same, it is my unequivocal assurance to the SECP that the irregularities occurred without any deliberate intent on my part or on the part of any of my representatives and were certainly not made with a view to making any gain or causing any loss or damage to any other person, including any of the companies that I dealt with or it was connected with, as regards the purchase and sale of USML shares.

It has been suggested to me that the purchase made of USML shares on my behalf, without disclosure to the sellers of the possibility of take-over of USML by JDW in October/November, 2005 might attract the above provisions of the law pertaining to insider trading apart from provisions pertaining to non-disclosure of being an 'interest' director. As I have previously stated, in fact full disclosure was made to all board members, who are either family members or otherwise closely connected person, and the details of the various transactions that were entered into were in their full knowledge even though not taken up in a meeting of the Board of Directors of JDW. Also, at the time the shares were purchased by Messrs Haji Khan and Allah Yar, the acquisition of USML by JDW was still in very preliminary stages of consideration and there was no certainty of any deal being concluded at all. Hence, the acquisition of such shares was not intended to result in any gain or cause any loss to any person. However, in view of the alleged violations pointed out by SECP I admit it does seem possible that some provisions of law may have unwillingly been contravened. If that is the case, then let me assure you that such contraventions were inadvertent and unintentional and were without any knowledge.

Clearly, the investigation conducted by the SECP and the suggestion of certain irregularities, as alluded to be me in the foregoing paragraphs, is a matter that I, as a law-abiding citizen and a businessman committed to maintaining the highest standards of corporate governance, take very seriously. As a practical demonstration of my bona fides, I seek to put all matters to rest by the return of any resultant gain that may have accrued from the alleged irregularities. Accordingly, in consideration of your agreeing to treat all matters referred to in your letter dated December 3, 2007 as closed and agreeing not to initiate any further legal proceedings (civil or criminal) under the applicable provisions of the 1984 Ordinance, the SE Ordinance and/or the Takeover Ordinance, 2002, it is hereby offered to return the gain of Rs.70.811 million to SECP (in trust for the persons entitled thereto), being the maximum amount recoverable under Section 15B(3) of the SE Ordinance, and to make payment of the sum of Rs.1.256 million, being the maximum amount recoverable under the various other provisions mentioned in your letter.

As you will no doubt appreciate, this offer is made in a spirit of cooperation and in good faith to avoid protracted proceedings and to fully and finally settle all matters highlighted in your letter dated December 3, 2007, despite my being advised that there are sound legal defences to the alleged violations. This letter may not be used as evidence in any legal or quasi legal (civil or criminal) proceedings. This letter and the offer stated herein are intended to be, and shall be treated as confidential, unless required to be disclosed by law or order of any court, authority or other competent body.

(emphasis supplied by us)

I look forward to receiving your response at the earliest.

Very truly yours,

Jahangir Khan Tareen"

From the contents of the above reply it is conspicuously noticed that the respondent has not denied the initiation of investigation competently and validly under the law by the SECP into the purchase of shares of USML.

It is also not denied that M/s Haji Khan and Allah Yar are not his employees and that the purchase of shares in their name was on his behalf. It is also conceded that the disclosure of the purchase of shares was not made by him in the meeting of the Board of Directors of JDW Sugar Mills Ltd.. Above all, the gain of Rs.70.811 million is admitted. It is admitted that in the purchase of the shares some irregularities might have occurred. The amount of fine which the SECP has demanded through the letter dated 11.1.2008 was immediately paid within 2/3 days. However the plea of inadvertence and *bona fide* was raised. But this reply is "**without prejudice**" and it is clearly mentioned therein that "*Accordingly, in consideration of your agreeing to treat all matters referred to in your letter dated December 3, 2007 as closed and agreeing not to initiate any further legal proceedings (civil or criminal) under the applicable provisions of the 1984 Ordinance, the SE Ordinance and/or the Takeover Ordinance, 2002, it is hereby offered to return the gain of Rs.70.811 million to SECP (in trust for the persons entitled thereto), being the maximum amount recoverable under Section 15B(3) of the SE Ordinance, and to make payment of the sum of Rs.1.256 million, being the maximum amount recoverable under the various other provisions mentioned in your letter*". It is specifically mentioned in the reply "*this offer is made in a spirit of cooperation and in good faith to avoid protracted proceedings and to fully and finally settle all matters highlighted in your letter dated December 3, 2007, despite my being advised that there are sound legal defences to the alleged violations"*. It is also mentioned in the reply *"This letter may not be used as evidence in any legal or quasi legal (civil or criminal) proceedings"*. This letter was followed by the final letter of the SECP dated 11.1.2008 which reads as below:-

"SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

PRIVATE AND CONFIDENTIAL

No.CLD/EMD/32/2006/520 *January 11, 2008*

Mr. Jahangir Khan Tareen,
Director,
JDW Sugar Mills Ltd,
17-Abid Majeed Road, Lahore Cantt.,
Lahore.

Sub: Investigation into the acquisition of United Sugar Mills Ltd. by JDW Sugar Mills Ltd.

Dear Sir,

This is with reference to your letter dated December 8, 2007 "Your Letter") in response to the Commission's Letter dated December 3, 2007 "Commission's Letter").

In terms of your letter, we note that you have recognized that the violations mentioned in the Commission's Letter may have occurred in the course of the purchase of the shares of USML and have offered to surrender the sum of Rs.70.811 million, being the resultant gain arising out of the transactions identified by the Commission.

The Commission considered your Letter in its meeting held on January 3, 2007. After due deliberation and taking into account all circumstances, including your offer to repay the gain made by you, the Commission has accepted your offer to make payment of the said gain of Rs.70.811 million, in terms of Section 15B(3) of the Securities & Exchange Ordinance 1969, in admission of your obligation under the law, in addition to maximum applicable fines totaling Rs.1.256 million under the following relevant provisions of law as detailed below:

(emphasis supplied by us)

		Section	*Amount*
1.	*Securities & Exchange Ordinance 1969*	*15-B(3)*	*70,811,000*
2.	*Companies Ordinance 1984*	*214*	*5,000*
3.	*Companies Ordinance 1984*	*216*	*5,000*
4.	*Companies Ordinance 1984*	*222*	*246,000*
5.	*Listed Companies (Substantial Acquisition of Voting Shares & Takeovers) Ordinance, 2002*	*4*	*1,000,000*
			72,067,000

Additionally, and as agreed by you through your counsel, you shall also pay the Commission's legal costs totaling Rupees one million, thereby aggregating to Rs.73.067 million.

> *You are accordingly directed to make immediate payment of the above-mentioned aggregate amount of Rs.73.067 million through bank draft failing which the Commission will be entitled to take appropriate action against you as prescribed by law. Upon receipt by the Commission of the bank draft the above-referred matters shall stand disposed off with no further action.*
>
> *It may be noted that this letter is being issued without any determination or acceptance by the Commission of any assertion as regards any issue of fact or law pertaining to the merits of the investigation into the various transactions to which you were party.*
>
> ***(emphasis supplied by us)***
>
> _____
> *TAHIR MAHMOOD*
> *Executive Director Enforcement"*

It is evident from the record and is an admitted position that the entire amount as demanded by the SECP, including the fines and the penalties and legal charges of Rs.1 million, were paid by the respondent without any hesitation vide bank drafts dated 14.1.2008 i.e. within the period of 2/3 days *(which was the immediate compliance sought by the SECP)*. Moreover in the said reply neither the *vires* of Sections 15-A and 15-B of the Ordinance, 1969 nor the authority of the SECP to investigate into the matter and proceed against and prosecute the respondent were questioned or challenged. We fail to understand why, and are indeed dismayed at the manner in which the SECP concluded the matter and decided in barely a month's time to accept the offer of the respondent and not to take any further action. Obviously this was purposively done and was a deliberate attempt on the part of the SECP to save the respondent from the criminal action which would have cost him a fortune and an honourable future because if truth be told, as mentioned earlier, he had without any reservation met the entire demand of the SECP accepting his civil liability in toto. However, as has been stated above, the offer of the respondent

was accepted in the meeting of the SECP dated 3.1.2008 and after due deliberation it was conveyed to the respondent that "*Upon receipt by the Commission of the bank draft the above-referred matters shall stand disposed off with no further action*". Furthermore the last para of the letter clearly states that it is being issued "*without any determination or acceptance by the Commission of any assertion as regards any issue of fact or law pertaining to the merits of the investigation into the various transactions to which you were party*". As regards the case of the petitioner, it is basically founded upon the admission or confession made by the respondent in his letter dated 8.12.2007; suffice it to say that at the very top of the letter it is conspicuously stated to be "**WITHOUT PREJUDICE**". Besides as mentioned at several occasions in the letter the respondent stated, that he was not admitting his liability and had agreed to pay the amount simply to settle the matter. This kind of an admission does not qualify the test of Article 36 of the Qanoon-e-Shahadat Order, 1984 *(Order, 1984)* which mandates that for the admission to be used against the person it should be unqualified. The question arises as to whether a qualified admission in the letter i.e. without prejudice and other reservations expressed therein can be used as an admission against the respondent in these proceedings. **The law is founded upon public policy and the "without prejudice rule" and is clear.** . The term "without prejudice" has been defined in **Black's Law Dictionary, Tenth Edition** as follows:-

> *"Without loss of any right; in a way that does not harm or cancel the legal rights or cancel the legal rights or privileges of a party."*
>
> *"Without prejudice: A phrase that, when incorporated in contracts, stipulations, and other written instruments, imports that the parties have agreed that, as between themselves, the receipt of the money by one, and the enjoyment of the other,*

> *shall not, because of the receipt and the payment, have any legal effect upon the rights of the parties; that such rights will be as open to settlement by negotiation or legal controversy as if the money had not been turned over by the one to the other. ... ." 40 Cyclopedia of law and Procedure 2130-30 (William Mack ed., 1912)."*

In **Stroud's Judicial Dictionary of Words and Phrases, Fifth Edition, Volume 5,** the term has been defined as:-

> *"A letter "without prejudice" cannot be treated "as an admission of right". This, in effect, seems to establish the principle that a letter "without prejudice" cannot be read without the consent of both parties (see hereon 34 S.J. 56). It cannot be used as an acknowledgement of a debt, within the Limitation Act, 1623 (c. 16). "From those cases it seems to me that the principle which emerges is that the court will protect, and ought to protect so far as it can, in the public interest, 'without prejudice' negotiations because they are very helpful in the disposal of claims without the necessity for litigating in court" (per Ormrod J., in Tomlin v. Standard Telephones and Cables 1969 1W.L.R. 1378).*

In **Wharton's Law Lexicon** following definition of the term 'without prejudice' has been given: -

> *"The words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter.*
>
> *The rule is that nothing written or said 'without prejudice' can be considered at the trial without the consent of both parties - not even by a judge in determining whether or not there is good cause for depriving a successful litigant of costs .... The word is also frequently used without the foregoing implications in statutes and inter parties to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean 'not affecting', 'saving' or 'excepting'."*

The term "without prejudice" has recognition since 19th Century when in the case reported as **Walker v. Wilsher [(1889) 23 QBD 335 at 337]**, the term was defined as under:-

> *"What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."*

In the case of **Rush & Tompkins Ltd. Vs. Greater London Council and another [(1988) 1 All ER 549]** it was held that:-

> *"The rule which gives the protection of privilege to 'without prejudice' correspondence 'depends partly on public policy', namely the need to facilitate compromise, and partly on 'implied agreement' as Parker LJ stated in South Shropshire DC v Amos (1987) 1 All ER 340 at 343: (1986) 1 WLR 1271 at 1277. The nature of the implied agreement must depend on the meaning which is conventionally attached to the phrase 'without prejudice'. ... ...*
>
> *In our judgment, it may be taken as an accurate statement of the meaning of 'without prejudice', if that phrase be used without more. It is open to the parties to the correspondence to give the phrase a somewhat different meaning, e.g. where they reserve the right to bring an offer made 'without prejudice' to the attention of the court on the question of costs if the offer be not accepted (See Cutts v. Head) but subject to any such modification as may be agreed between the parties, that is the meaning of the phrase. In particular, subject to any such modification, the parties must be taken to have intended and agreed that the privilege will cease if and when the negotiations 'without prejudice' come to fruition in a concluded agreement."*

Recently, a 6-Member Bench of the Supreme Court of UK, in the case reported as **Oceanbulk Shipping and Trading SA Vs. TMT Asia Ltd. and others (2012 SCMR 1112) = ([2010] UKSC 44) = ([2010] 4 All ER 1011)** has dilated upon the rule of "without prejudice" and its effect on the transactions. After considering the case-law starting from the case of **Walker v. Wilsher** *(supra)* the Court held as under:-

> *"19. The approach to without prejudice negotiations and their effect has undergone significant development over the years……The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations. The underlying rationale of the rule was that the parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute……*
>
> *27. The without prejudice rule is thus now very much wider than it was historically. Moreover, its importance has been judicially stressed on many occasions, most recently perhaps in Ofulue's case [2009] 3 All ER 93, [2009] AC 990, where the House of Lords identified the two bases of the rule and held that communications in the course of negotiations should not be admissible in evidence……"*

In the case of **Madhavrao Ganeshpani v. Gulabbhai Lallubhai [(1899) 23 Bom. 177]** it has been held that the use of the word "without prejudice" in a letter or document means that for the purpose of a discussion and the possibility for coming to a settlement, the writer would be frank but that what is said with that object in view shall not be used in evidence, if the object with which it was written fails and the dispute goes to a Court. In **[(1869) 10 Cal. WN 1 (25)]** it was held that an admission made in a letter written "without prejudice" is not a

binding admission. *(see: The AIR Manual, Civil and Criminal, 6th Edition Vol.22)*. In the case of **State Life Insurance Corporation of Pakistan Vs. Wali Muhammad Akbarji and others (1985 CLC 2870)** it was observed as under:-

> *"Any letter marked without prejudice during offers or propositions between litigating parties is excluded from consideration and cannot be treated as evidence."*

In the judgment reported as **Oceanbulk Shipping and Trading SA Vs. TMT Asia Ltd. (2012 SCMR 1112)**, it has been held as follows:-

> *"In particular, in the Unilever case Robert Walker LJ (with whom Simon Brown LJ and Wilson J agreed) set out the general position with great clarity ([2001] 1 All ER 783 at 789-791 and 796-797, [2000] 1 WLR 2436 at 2441-2444 and 2448-2449]. He first quoted from Lord Griffiths's speech in Rush and Tompkins Ltd. v. Greater London Council, with which the other members of the appellate committee agreed. Rush and Tompkins Ltd. v. Greater London Council is important because it shows that the without prejudice rule is not limited to two-party situations or to cases where the negotiations do not produce a settlement agreement. It was held that in general the rule makes inadmissible in any subsequent litigation connected with the same subject-matter proof of any admissions made with a genuine intention to reach a settlement and that admissions made to reach a settlement with a different party within the same litigation are also inadmissible, whether or not settlement is reached with that party."*

The same principal has been reiterated and fortified in various dicta of foreign as well as Pakistani jurisdiction reported as **Superintendent (Tech.I) Central Excise, I.D.D.Jabalpur and others Vs. Pratap Rai (AIR 1978 SC 1244)**, **M/s Tarapore & Company Vs. Cochin Shipyard Ltd., Cochin and another (AIR 1984 SC 1072), Chairman & M.D.,**

N.T.P.C. Ltd vs MS. Reshmi Constructions, Builders & Contractors (AIR 2004 SC 1330), **Pakistan Vs. Messrs Gulf Steamships Ltd. (PLD 1961 (W. P.) Karachi 502)**, **Pakistan Refinery Ltd. Vs. Mst. Shahida Sultan (1988 MLD 1150)** and **Qaid Jauhar Vs. Mst. Hajiani Hajra Bai (2002 CLC 551)**.

Therefore in view of the above referred law, the admission on which much stress has been laid by the petitioner being inadmissible in evidence, cannot be used against the respondent even in these proceedings. Leaving aside the "without prejudice" aspect of the respondent's letter, even otherwise it cannot be said that the respondent has made an unqualified admission of the violation of any provision of the said laws or commission of any offence or that the contents of the SECP's letter dated 3.12.2007 were unequivocally admitted. It is settled law, that an admission has to be considered in the context in which it is made and read as a whole. It should not be bifurcated into parts with the 'admitting portions' going against the party being taken into account whilst the parts qualifying the admission are ignored or disregarded. Reference in this regard may be made to the following passages from some renowned authors on the subject or the case law:-

> *1. The whole statement containing the admissions must be taken together; for though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part, which is evidence against him, cannot be ascertained*[1].
>
> *2. It is a general rule that the whole of the account which a party gives of a transaction must be taken together; and his admission of a fact disadvantageous to himself shall not be received, without receiving at the same time his*

[1] *Taylor puts it in his Law of Evidence (11th edition) Art. 725 at page 502*

contemporaneous assertion of a fact favourable to him, not merely as evidence that had made such assertion, but admissible evidence of the matter thus alleged by him in his discharge[2].

3. The admission must be taken as a whole and it is not permissible to rely on a part of the admission ignoring the other[3].

4. If an admission is in writing and if an opposite party wants to make use of that statement as an admission then the whole statement containing the admission must be taken together to ascertain what the party has conceded against himself. Unless the whole is received the true meaning of the part which is evidence against him cannot be ascertained. An admission unless it is separable has to be taken as a whole or not at all. If a statement is not capable of dissection because that particular part is inextricably connected with the other part then it must be read as a whole[4].

5. The statement made by an accused must be read as a whole and it is not open to the Court to dissect the statement and pick up a part of the statement which is incriminating and reject the part which is exculpatory[5].

Moreover there is no determination by the SECP holding the respondent guilty of violating the said laws; the SECP never prosecuted the respondent under Section 25 of the Ordinance, 1969 which reads as *"**Cognizance of offence.-** No court shall take cognizance of any offence punishable under this ordinance except on a report in writing of the facts constituting the offence by an officer authorized in this behalf by the Commission; and no court inferior to that of a court of Session shall try any such offence"* and obviously he has not been tried or convicted or punished for the commission of an offence of insider

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[2] *Archbold's Criminal Pleading, Evidence and Practice (Thirty-sixth Edition, page 423)*

[3] *Dudh Nath Pandey (Dead) By Lrs vs Suresh Chandra Bhattasali (Dead) (AIR 1986 SC 1509) and Nishi Kant Jha vs State Of Blihar (AIR 1969 SC 422)*

[4] *K.S. Venkatesh S/O K. Swamy Rao vs N.G. Lakshminarayana [ILR 2007 KAR 2894] = [2008 (2) KarLJ 342]*

[5] *Koli Trikam Jivraj And Anr. vs The State Of Gujarat (AIR 1969 Guj 69)*

trading by the court of competent jurisdiction. *(Note:- Section 15-E to which reference has been made by the petitioner in his petition was introduced by way of an amendment through Finance Act, 2008 dated 27.6.2008 meaning thereby that this cannot be retrospectively applied and the action would have been restricted to the provisions of Section 15-A and 15-B of the Ordinance, 1969). (Note:- If we otherwise hold that law to be a valid law).* On account of the above, we are of the candid view that as the respondent was never proceeded against under the relevant provisions, adjudged or determined to be guilty of insider trading; prosecuted, convicted or punished, rather it seems that a settlement between the respondent and the SECP was effected to save the respondent, whereby the matter was closed by the latter against the former; thus to attribute dishonesty to the respondent on account of insider trading, after the lapse of around a decade, cannot be made the ground for his disqualification under Article 62(1)(f) of the Constitution. In the above circumstances the rule of past and closed transactions would come into play. We would also like to mention here that if a person has violated any law, especially a fiscal law and has made a misdeclaration or concealment to evade his tax liability or has committed the violation of any other law for which conviction and penalty in the nature of imprisonment or fine has been provided, the action should be strictly taken against such person in accordance with the provisions of that law, by the forum created and having jurisdiction thereunder; because Article 4 of the Constitution mandates *"To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen".* It is also the foundational principle of jurisprudence that where a law requires an act to be done in a particular manner it has to be done accordingly. Therefore when a person is alleged *(and not proven)* to have violated some law in the past and is elected subsequently as a member of the Parliament, he cannot be held to be dishonest under Article 62(1)(f) *(ibid)* in quo-warranto proceeding. However if during the

term of his office a member of the Parliament is declared by a forum of competent jurisdiction of having incurred a disqualification envisaged by the Article *(ibid)* he can be removed from the office by the superior Courts in the exercise of their quo-warranto jurisdiction.

6. Coming to the question about the vires of Sections 15-A and 15-B of the Ordinance, 1969 as introduced by the Finance Act, 1995 and the argument of the learned counsel for the respondent that being violative of the provisions of Article 70(2) of the Constitution the said sections are void *ab initio* and *non-est*, it may be held that the respondent has never challenged the said provisions through any independent proceedings at any stage. No challenge was made when the SECP issued the letter to the respondent, instead he promptly made the payment as demanded by the SECP. Even in the first concise statement filed by the respondent in these proceedings there was no challenge to the sections. It was only in the second concise statement that the vires of the law were challenged and at the time of oral submissions, the same was reiterated. We are conscious of the principle that there is no estoppel against law and that the point of law can be allowed to be raised at any stage of the proceeding and no valid structure can be built upon a foundation of the law which is void *ab initio*. No rights and liabilities can be created on the basis of such law. Even accepting the argument of the respondent's counsel that the *vires* of law as held in the **Sindh High Court Bar Association**'s case *(supra)* can be challenged in collateral proceedings, yet it cannot be accepted that a person can be allowed to challenge a law which stands repealed and no longer exists on the statute book. Such an eventuality shall be covered and protected by the rule of past and closed transactions. Therefore, we are not inclined to declare the repealed law as *ultra vires* particularly on the touchstone of Article 70(2) and falling outside the purview of Article 73(2) of the Constitution when the

provisions of Ordinance, 1969 and all the actions taken and the orders passed thereunder have been protected and validated and saved respectively by the Sections 177(13) and 178 of the Securities Act, 2015 *(Act, 2015)* which read as under:-

> *"**177(13).** Anything done, actions taken, orders passed, instruments made, notifications issued, proceedings initiated and instituted, prosecutions filed, processes or communications issued and powers conferred, assumed or exercised by the Commission under the Securities and Exchange Ordinance, 1969 (XVII of 1969) and the Listed Companies (Substantial Acquisition of Voting Shares and Take-Overs) Ordinance, 2002 (CIII of 2002), shall, on the coming into operation of any provision of this Act, be deemed to have been validly done, made, issued, taken, initiated, conferred, assumed and exercised and every action, prosecution or proceeding instituted and every order, directive, notification, circular, code, guidelines etc. issued by the Commission shall be deemed to have been initiated, instituted or issued under this Act and shall be proceeded with to completion and be enforced and have effect accordingly.*
>
> ***178. Repeal and savings.*** *--- (1) The enactments specified in the Schedule to this Act are hereby repealed to the extent mentioned in the fourth column thereof.*
>
> *(2) Notwithstanding the repeal of any enactments by this section,*
>
> *(a) any notifications, rules, regulations, bye-laws, orders or exemption issued, made or granted under any such enactment shall have effect as if had been issued, made or granted under the corresponding provision of this Act;*
>
> *(b) any official appointed and anybody elected or constituted under any such law shall continue and shall be deemed to have been appointed, elected or constituted, as the case may be, under the corresponding provision of this Act;*
>
> *(c) any document referring to any enactment hereby repealed shall be construed as referring, as far as may be, to this Act, or to the corresponding provision of this Act;*

> *(d) mortgages recorded in any register book maintained at any office under any enactment hereby repealed shall be deemed to have been recorded in the register book maintained under the corresponding provision of this Act;*
>
> *(e) any licence, certificate or document issued made or granted under any enactment hereby repealed shall be deemed to have been issued, made or granted under this Act and shall, unless cancelled in pursuance of the provision of this Act, continue in force till the date specified in the certificate or document."*

This is the Act of the Parliament on which no objection of invalidity has been raised for any reason whatsoever, thus to our clear understanding the Act, 2015 has not only saved the action(s) and order(s) passed under the Ordinance, 1969 but has also validated the defects of incorporation of Sections 15-A to 15-E of the Ordinance, 1969 through Finance Acts on the touchstone of Article 70(2) *(ibid)*. If these provisions are declared to be void in these proceedings, it shall mean that all actions taken and orders passed against any person shall stand invalidated, with the consequence that the respondent shall also be able to wriggle out of his offer and demand back the money which he has paid to the SECP. But, as the insider trading is prohibited under the Act, 2015, constituting an offence, we can always direct the SECP to reopen the matter against the respondent and to proceed against him afresh. This is where the rule of past and closed transactions shall not come to his rescue. In light of the above the plea of the respondent with respect to the *ultra vires* of the assailed provisions is dismissed. However in view of the above discussion, we do not find that the respondent can be declared to be dishonest in terms of Article 62(1)(f) of the Constitution.

OFF-SHORE COMPANY - TRUST (Proposition No.2):

(That Respondent No. 1 has publically admitted that his children own off-shore company for conducting business and holding properties in United Kingdom coupled with fact that he receives huge sums of money from his children thus demonstratively making him the beneficial owner of the business and properties in United Kingdom

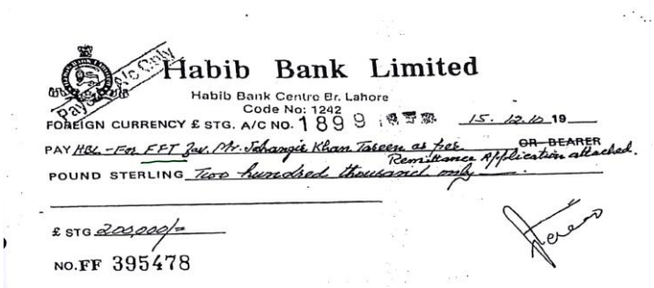
which he has failed to disclose in his tax returns or in the statements of assets and liabilities before Election Commission of Pakistan thus making him not qualified to contest the election of, or being a member of Parliament by virtue of the provisions of Article 62(1)(f) of the Constitution of Islamic Republic of Pakistan.)

7. In brief it is the case of the petitioner that the respondent has established an off-shore company(ies), which has assets. The company(ies) and the assets have not been disclosed/ declared by him in the statement of assets and liabilities filed with his nomination papers and/or in his tax returns *(wealth statements)*. This is violative of Section 12(2) of ROPA and the provisions of the Income Tax Ordinance, 2001 *(Ordinance, 2001)*; reference in this regard is made to Section 192 of the Ordinance *ibid* which provided for an offence, prosecution, conviction and punishment. The reason for not mentioning the name of such company or the asset(s)/property(ies) owned by it in the petition is that the petitioner was/is not aware of the particulars in this behalf; as these facts were exclusively in the knowledge of the respondent. It was not a publicly known fact and given the secretive manner and the object for which such companies are created it is almost impossible for a common man in Pakistan to attain knowledge of the same. However, from the contents of the petition and the documents attached thereto, it seems that the petitioner took up this plea on the basis of the media report titled *"PTI's Tareen finally admits owning off-shore company in children's name" (see pages 11 to 14 of the petition)*. In his concise statement, the respondent did not specifically deny this allegation. Instead, he made an evasive reply in certain respects, which in law can always be considered as an admission of fact made in the written statement. Whereas the extent to which the respondent made an unequivocal and unqualified admission shall be highlighted below. The contents of the reply *(concise statement)* of the respondent are quite striking, thus it is advantageous to reproduce paragraph No.2(v) thereof *"the Answering Respondent voluntarily and in good faith*

disclosed to the public that: (a) his independent children are the beneficiaries under a trust arrangement in an off-shore company; (b) all of the funds, constituting statutory income tax paid income in Pakistan, for settlement and establishment of the said trust were duly remitted through official banking channels in accordance with applicable law; (c) the Answering Respondent himself has no beneficial interest therein and is simply the settlor of the trust in question; (d) there is no legal or mandatory requirement for a settlor to make any disclosure in any nomination form, or income tax return or wealth statement under applicable law since, inter alia, the same do not constitute any asset or liability of the Answering Respondent personally; and (e) the independent children of the Answering Respondent have at all material times been disclosing the beneficial interest in the trust in their statutory wealth statements submitted under Section 116 of the Income Tax Ordinance, 2001 ("2001 Ordinance") regarding which the tax authorities have never raised any question or dispute whatsoever to date" ***(emphasis supplied by us)***. From the above, it is clear that the respondent admitted to the existence of an off-shore company; its disclosure to the public; but with the note of caution that it is his children who are the beneficiaries of the company through some trust arrangement, the funds to create and finance the company are acknowledged to have been provided by the respondent, on which according to him, income tax was paid and the same were sent through official banking channels. Most importantly it is categorically and unequivocally stated that *"**the Answering Respondent himself has no beneficial interest therein and is simply a settlor of the trust in question**"* ***(emphasis supplied by us)***. However, most significantly, certain information was withheld: the name of the company; how and when it was created, who established the same, where it was incorporated, who are the shareholders, what is the management setup thereof; what properties *(assets)* are owned by such company; and what is the nature of the trust arrangement. This vital information remained behind a fug of obscurity. **However**, as the proposition was crucial in nature and once the initial

information was laid before the Court by the petitioner and in view of the reply of the respondent *(described above)*, this Court on its own, while exercising its inquisitorial authority, pressed the respondent to provide the particulars about the *(off-shore)* company with full details in all respects. As in the circumstances of this case, according to the provisions of Article 122 of the Order, 1984 which mandates that *"**Burden of proving fact especially within knowledge:** When any fact is especially within the knowledge of any person the burden of proving that fact is upon him"*, the burden to prove the above fact was upon the shoulders of the respondent. In this context it is to be noted that in the judgment reported as **Abdul Karim Nausherwani and another Vs. The State through Chief Ehtesab Commissioner (2015 SCMR 397)** it was held that the burden of proving a circumstance/fact that is especially within the knowledge of a person is for him to establish and failing to do so the absence of the same is to be presumed *(Articles 119, 121 and 122 of the Order, 1984)*. The ratio of the judgment **Saeed Ahmed Vs. The State (2015 SCMR 710)** is that Article 122 of the Order, 1984 stipulates that if a particular fact is especially within the knowledge of any person the burden of proving that fact is upon him. In the judgment reported as **Mst. Kamina and another Vs. Al-Amin Goods Transport Agency through L.Rs and 2 others (1992 SCMR 1715)** it was enunciated that Article 122 of the Order, 1984 envisages that when any fact is especially within the knowledge of any person the burden of proving that fact is upon that person. In **State of Rajasthan vs. Kashi Ram [(2006) 12 SCC 254]** it was held that the principle is well settled; the provisions of Section 106 of the Evidence Act, 1872 *(pari materia with Article 122 of the Order, 1984)* itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. This case was relied upon with approval in the case of

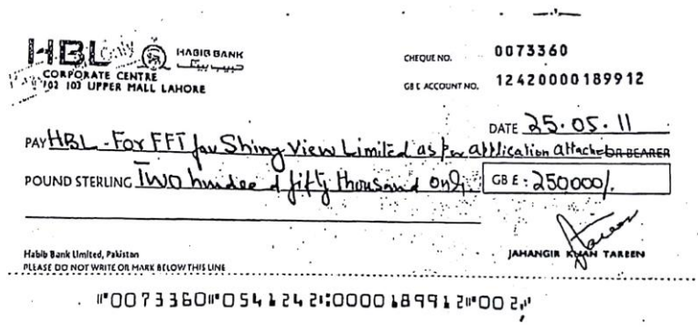
Sathya Narayanan vs State rep. by Inspector of Police [(2012) 12 SCC 627]. Consequently when required by the court to discharge that burden it is for the first time that the respondent filed CMA No.5574/2017 on 8.8.2017 *(after 8/9 months of his filing the concise statement to the petition)* through which he simply placed on the record certain documents *(which shall be discussed later)*. Even at this stage he did not clarify his stance through a written version/statement, as required by the law, *(Note:- except in the course of oral submissions and the written arguments submitted at the conclusion of the case where some explanations were tendered)*. Be that as it may, from these documents it transpired that the name of the off-shore company is **Shiny View Limited** ***(SVL)*** incorporated in British Virgin Islands *(Jersey)* on 27.4.2011. It is not clear again as to who created it, who is *(are)* the shareholder(s), what is the management structure of the company. However, along with this CMA a self-prepared statement of accounts has been filed showing that an amount of £2,295,000 was remitted by the respondent through eleven cheques from his foreign currency account No.1242-0000-1899-12 maintained with HBL *(Pakistan)* to his own Payee Account *(HBL)* in the UK. This was done during the period from 15.12.2010 to 5.5.2011. However no corresponding credit entry for such amounts has been proved through the bank statement of the respondent's bank account abroad. And its further utilization and disbursement has not been established through any document by the respondent. One of such cheques dated 15.12.2010 is scanned as under:-



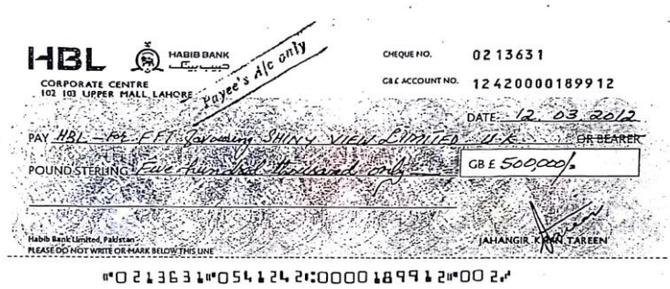
Habib Bank Limited
Habib Bank Centre Br. Lahore
Code No: 1242
FOREIGN CURRENCY £ STG. A/C NO. 1899
15. 12. 10
PAY HBL - For FFT for Mr. Jahangir Khan Tareen as per Remittance Application attached. OR BEARER
POUND STERLING Two hundred thousand only
£ STG 200000/-
NO.FF 395478

(Note:- All other cheques from pages 90 to 100 of CMA No.5574/2017 of a similar nature perhaps having different amounts have been placed on the record).

Another cheque dated 25.5.2011 *(at page 100 of the CMA)* amounting to £250,000 is the remittance by the respondent to **SVL**. From the record it appears that the same was sent after the purchase price of £2,100,000 of the 12 acres of land *(with old structure)* named Hyde House situated at Hyde Lane, Ecchinswell, Hampshire RG20 4UN was made over to the owner on 10.5.2011. The sale was registered in HM Land Registry on 15.8.2011 in the name of SVL as proprietor. It has not been established till this point that SVL or its property is held under any trust arrangement. The cheque is scanned as below:-

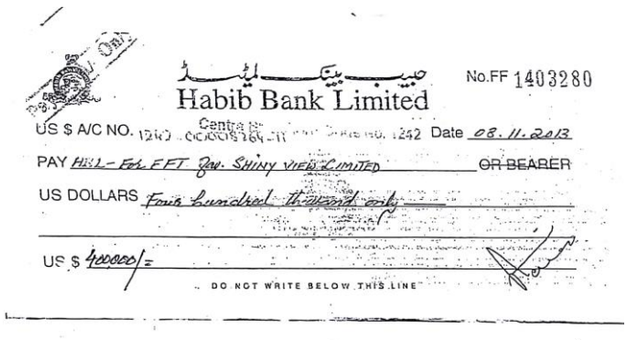

HBL HABIB BANK
CORPORATE CENTRE
102 103 UPPER MALL LAHORE
CHEQUE NO. 0073360
GB £ ACCOUNT NO. 12420000189912
DATE 25.05.11
PAY HBL - For FFT for Shiny View Limited as per application attached BR BEARER
POUND STERLING Two hundred fifty thousand only. GB £ : 250000/.
Habib Bank Limited, Pakistan
PLEASE DO NOT WRITE OR MARK BELOW THIS LINE
JAHANGIR KHAN TAREEN
⑈0073360⑈054124⑆0000189912⑈00 2⑈

Another amount of £500,000 was remitted by the respondent to **SVL** and to prove this remittance reliance has been placed upon respondent's bank statement and the cheque of the said amount dated 12.3.2012 which is scanned as under:-

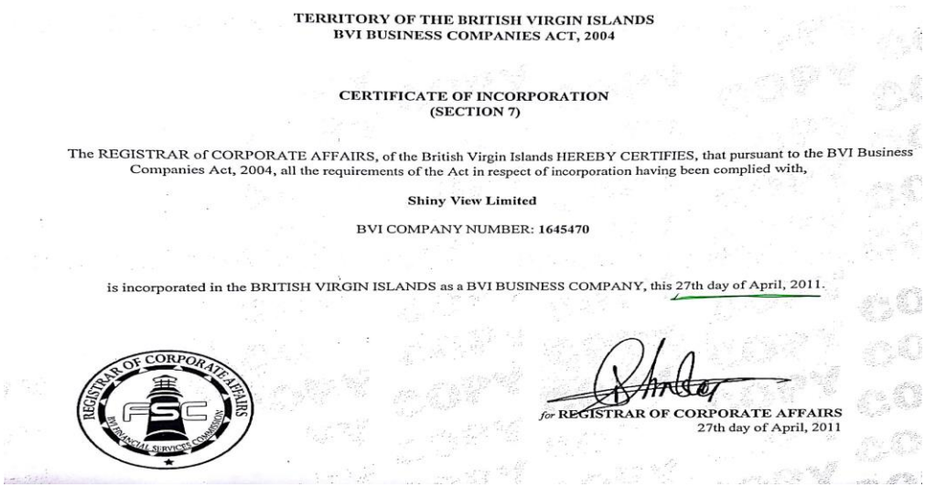

HBL HABIB BANK
CORPORATE CENTRE
102 103 UPPER MALL LAHORE
Payee's a/c only
CHEQUE NO. 0213631
GB £ ACCOUNT NO. 12420000189912
DATE 12.03.2012
PAY HBL - For FFT favouring SHINY VIEW LIMITED U.K. BR BEARER
POUND STERLING Five hundred thousand only. GB £ 500000/-
Habib Bank Limited, Pakistan
PLEASE DO NOT WRITE OR MARK BELOW THIS LINE
JAHANGIR KHAN TAREEN
⑈0213631⑈054124⑆0000189912⑈00 2⑈

Furthermore, amounts of $400,000, $300,000 and $400,000 were remitted by the respondent to **SVL** vide cheques dated 8.11.2013,

11.12.2013 and 26.3.2014 respectively from his US dollar account maintained with HBL *(Pakistan)*. One of the cheques dated 8.11.2013 is scanned as under:-


حبیب بینک لمیٹڈ
Habib Bank Limited
No.FF 1403280
US $ A/C NO. 1240 Centre Br. No. 1242 Date 08.11.2013
PAY HBL-Fdt. EFT Gw. Shiny View Limited OR BEARER
US DOLLARS Four hundred thousand only
US $ 400000/=
DO NOT WRITE BELOW THIS LINE

It is not clear as to who had opened or was operating the bank account of **SVL** abroad. As mentioned earlier **SVL** was incorporated on 27.4.2012 and the incorporation certificate *(which appears on page 111 of CMA No.5574/2017)*, is scanned as under:-


TERRITORY OF THE BRITISH VIRGIN ISLANDS
BVI BUSINESS COMPANIES ACT, 2004

CERTIFICATE OF INCORPORATION
(SECTION 7)

The REGISTRAR of CORPORATE AFFAIRS, of the British Virgin Islands HEREBY CERTIFIES, that pursuant to the BVI Business Companies Act, 2004, all the requirements of the Act in respect of incorporation having been complied with,

Shiny View Limited

BVI COMPANY NUMBER: **1645470**

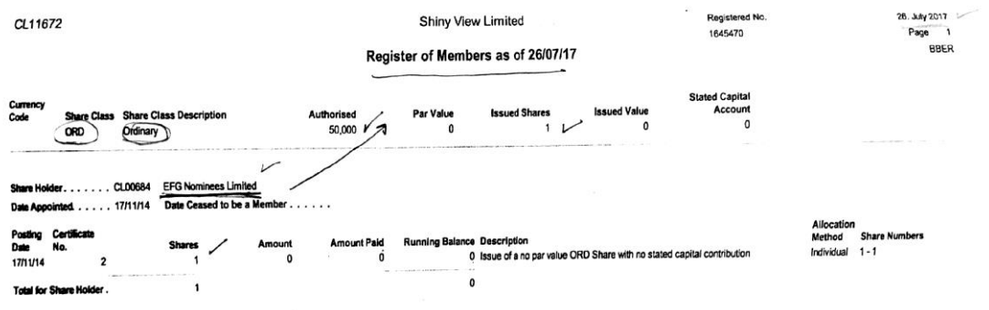
is incorporated in the BRITISH VIRGIN ISLANDS as a BVI BUSINESS COMPANY, this 27th day of April, 2011.

REGISTRAR OF CORPORATE AFFAIRS FSC FINANCIAL SERVICES COMMISSION

for REGISTRAR OF CORPORATE AFFAIRS
27th day of April, 2011

From this certificate of incorporation it is not possible to establish the identity of the shareholder(s) or the Director(s) of the **SVL**, but at page 112 of the noted CMA, an unattested copy of **SVL** Register of Members as on 26.7.2017 has been placed, showing the authorized capital of the Company as £50,000, issued share as 1 *(one)* with par value of 0 *(zero)* and the shareholder as EFG Nominees Limited. Statedly the share was issued on 17.11.2014. Though the par value of the share is shown to be

0 *(zero)*, but if it is considered to be for the full value of the authorized capital of the company and it was purchased by EFG Nominees Limited for the same value; the unanswered question remains, who originally paid this amount, when and how? The copy of the above document is reproduced below:-



CL11672 Shiny View Limited Registered No. 1645470 26. July 2017 Page 1 BBER

Register of Members as of 26/07/17

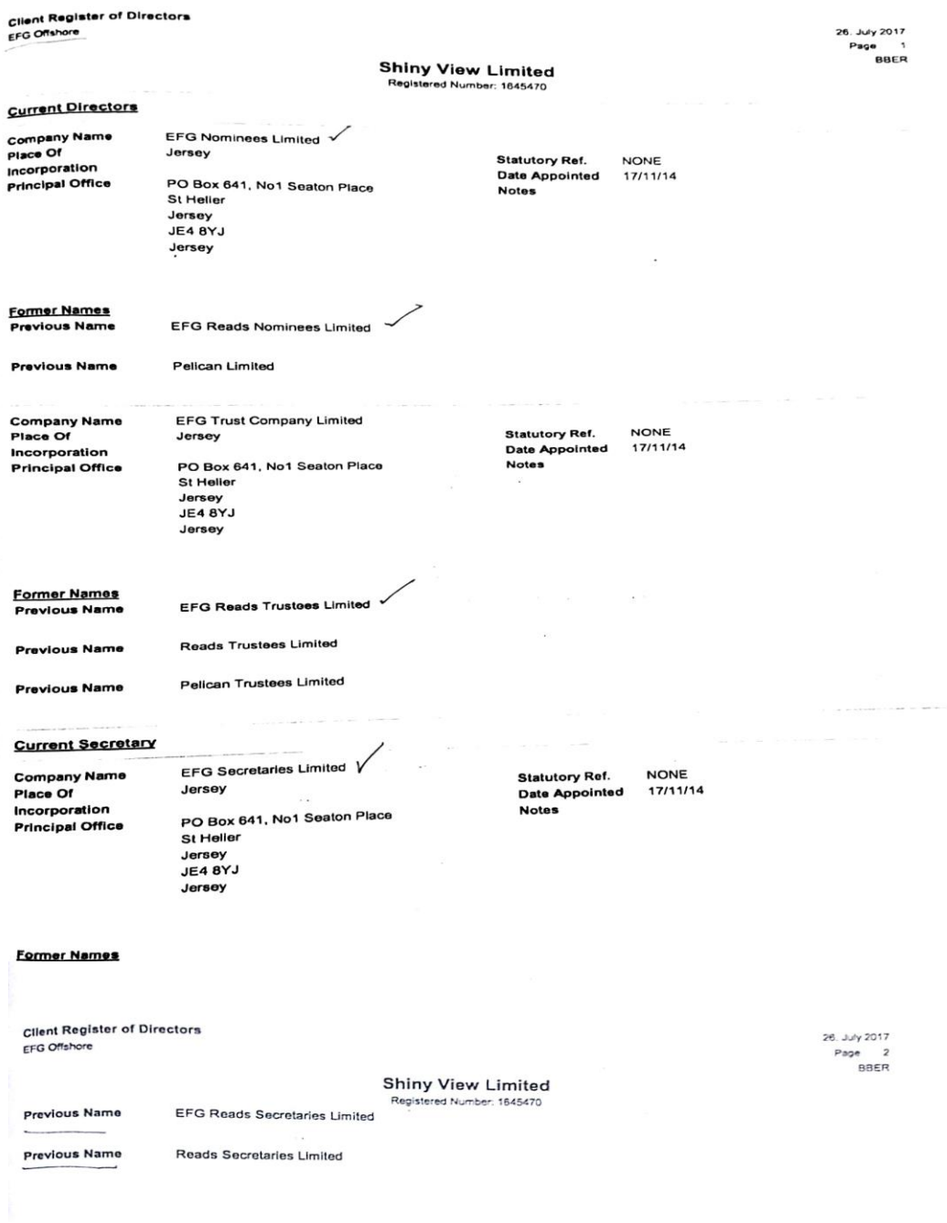
Currency Code	Share Class	Share Class Description	Authorised	Par Value	Issued Shares	Issued Value	Stated Capital Account
	ORD	Ordinary	50,000	0	1	0	0

Share Holder . . . . . CL00684 EFG Nominees Limited
Date Appointed . . . . . 17/11/14 Date Ceased to be a Member . . . . . .

Posting Date	Certificate No.	Shares	Amount	Amount Paid	Running Balance	Description	Allocation Method	Share Numbers
17/11/14	2	1	0	0	0	Issue of a no par value ORD Share with no stated capital contribution	Individual	1 - 1
Total for Share Holder .		1			0			

Before proceeding further it may be pointed out that the entire amount which has been remitted by the respondent from time to time to his own account abroad is £2,295,000; to SVL £750,000 and $1,100,000 as per the exchange rate prevalent at that time this was equivalent to a total of around **Rs.532,354,000/-** *(fifty three crores, twenty three lacs and fifty four thousand only)*. According to the learned counsel this is the **money** *(money trail)* with which Hyde House *(with old structure)* was purchased and part of the construction cost and other ancillary charges were met. The price of the land was £2,100,000; stamp duty £105,000; registration fee £920 and £18,539.99 were paid as handling charges to Thomas Eggar *(perhaps an estate agent)*, the total amount for the purposes of Hyde House *(old structure)* being £2,224,459.99. For the new construction and development of Hyde House by SVL c/o EFG Trust Company Limited *(see page 121 of CMA No.5574/2017)* £2,525,018.73 were spent in addition. In this regard a self-prepared statement has been placed on the record. According to this, a loan was arranged from EFG Private Bank Limited by creating a charge dated 23.7.2015 over the property, but the amount of loan has not been

disclosed. It is also not established when the loan was procured or granted. *(Note:- It is also not clear if the loan was procured by the EFG Nominees Limited, SVL or the respondent)*. It is argued by the learned counsel for the respondent, that the current shareholder *[one share of par value 0 (zero)]* and Directors of the SVL are "EFG Nominees Limited" and according to HM Land Registry, the Hyde House is legally owned by SVL. *(In this behalf reliance has been placed upon documents i.e. official copy of register of title at pages 115 to 119 of CMA No.5574/2017)*. It is also submitted that the above company *(EFG Nominees Limited)* is held/nominated by "**EFG Trust Company Limited**". The entire amount for the purchase of the property was borne by the respondent in the manner stated above which amount was sent through proper banking channels either to his own account *(subsequently transferred to the SVL or to the seller of the property or the alleged trust. This aspect remains absolutely unexplained and unclear)* or the account of SVL. It may be relevant to mention here that in this CMA a copy of Register of Directors of SVL dated 26.7.2017 has been filed *(Client Register of Directors EFG Offshore on page 113 of CMA No.5574/2017)* which has three vertical columns; according to the first column the current Director of **SVL** is EFG Nominees Limited, the date of appointment being 17.11.2014. The former name of the above entity was "EFG Reads Nominees Limited" and prior thereto its name was "Pelican Limited". In the second column the name of the Director of SVL is "EFG Trust Company Limited", the date of appointment again being 17.11.2014, the former name/previous name was "EFG Reads Trust Limited", the previous name whereof was "Reads Trustees Limited" and prior thereto the name was "Pelican Trustees Limited". This document is scanned as follows:-



Client Register of Directors
EFG Offshore

26. July 2017
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Shiny View Limited
Registered Number: 1645470

Current Directors

Company Name: EFG Nominees Limited
Place Of Incorporation: Jersey
Principal Office: PO Box 641, No1 Seaton Place, St Helier, Jersey, JE4 8YJ, Jersey
Statutory Ref.: NONE
Date Appointed: 17/11/14
Notes:

Former Names
Previous Name: EFG Reads Nominees Limited
Previous Name: Pelican Limited

Company Name: EFG Trust Company Limited
Place Of Incorporation: Jersey
Principal Office: PO Box 641, No1 Seaton Place, St Helier, Jersey, JE4 8YJ, Jersey
Statutory Ref.: NONE
Date Appointed: 17/11/14
Notes:

Former Names
Previous Name: EFG Reads Trustees Limited
Previous Name: Reads Trustees Limited
Previous Name: Pelican Trustees Limited

Current Secretary

Company Name: EFG Secretaries Limited
Place Of Incorporation: Jersey
Principal Office: PO Box 641, No1 Seaton Place, St Helier, Jersey, JE4 8YJ, Jersey
Statutory Ref.: NONE
Date Appointed: 17/11/14
Notes:

Former Names

Client Register of Directors
EFG Offshore

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Shiny View Limited
Registered Number: 1645470

Previous Name: EFG Reads Secretaries Limited
Previous Name: Reads Secretaries Limited

It may be expedient to mention here that the name of no trust or trustees particularly "HSBC GUYERZELLER TRUST COMPANY" finds mention in the above document. Despite the repeated verbal directions of the Court on many occasions the "arrangement of trust" as mentioned in the concise statement of the respondent was not filed *(not with this CMA No.5574/2017)*. It was only on the clear command of this Court apprising the respondent's counsel about the consequences of the failure to do so, that the needful was belatedly done; and through CMA No.8187/2017 dated 2.11.2017 a copy of the document *(the settlement)* attested by some

"Authorized Signatory" of EFG Wealth Solutions (Jersey) Limited was submitted. And on the basis thereof, which is purportedly executed on 5.5.2011 between the respondent *(settlor)* and HSBC GUYERZELLER TRUST COMPANY *(the original trustee) (hereinafter referred to as HSBC)* the counsel for the respondent has argued that this is the "Trust Arrangement" under which SVL and the Hyde House is held by the afore-named trustee i.e. "EFG Nominees Limited" which is the nominee of the "EFG Trust Company Limited" the present trustee of SVL and its property, and this is an irrevocable discretionary trust created by the respondent. The discretionary lifetime beneficiaries *(i.e. the respondent and his spouse)* or the beneficiaries *(hereinafter discretionary beneficiaries)* under the trust are the persons specified in Schedule III and IV thereof *(the settlement)*, who have no legal or beneficial ownership or interest in the assets held by the trust through SVL *(i.e. Hyde House)*. According to the English law and the law in force in Cayman Islands *(which is the governing law of the Settlement as per clause 14)* and the British Virgin Islands *(where SVL was incorporated)* in the matter of a discretionary trust, no person shall have any outright beneficial ownership so long as the trust property remains under the absolute discretionary control and powers of the trustee in such trust. And the individuals who are listed as discretionary beneficiaries, do not have any formal, legal or beneficial ownership of any assets in such trust. Instead, according to the trust of this nature, the discretionary beneficiaries have a mere hope of being considered for receiving benefits from the trustees in the exercise of their discretion whenever such benefit accrues. Even if a settlor is a discretionary beneficiary of such a trust, he cannot be said to have any defined beneficial interest or the ownership in the trust assets/property, for so long as he remains only one of a class of the discretionary beneficiaries. In this regard reliance has been placed upon a judgment from the House of Lords reported as **Gartside Vs. Inland**

Revenue Commissioners (1968 AC 553). The relevant part whereof is reproduced as under:-

> *"No doubt in a certain sense a beneficiary under a discretionary trust has an "interest": the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a Court of Equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion "fairly" or "reasonably" or "properly" that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes. But that does not mean that he has an interest which is capable of being taxed by reference to its extent in the trust fund's income: it may be a right, with some degree of concreteness or solidity, one which attracts the protection of a Court of Equity, yet it may still lack the necessary quality of definable extent which must exist before it can be taxed." (per Lord Reid).*

As has been stated above, for the purposes of laying down the foundation of his stance/defence in relation to the trust and off-shore company **SVL,** no written version in the form of a reply *(pleadings)* was ever filed by the respondent which was expedient, however the learned counsel for the respondent made oral submissions explaining and attempting to connect the documents with respondent's plea that SVL and its asset, Hyde House, is held in trust by EFG Nominees Limited, which is the nominee of EFG Trust Company Limited. In addition, he has given to the Court his written submissions and we find it expedient to reproduce the same, to better comprehend the stance of the respondent in this regard:-

> *"1(a) Legal & Factual Background:*
>
> *(i) There is a residential property in England (Hyde House) which, in substance, is held under a trust arrangement*

through an "Irrevocable Discretionary Trust". (The deed of "Settlement" is at page2-38 of CMA 8187).

(emphasis supplied by us)

(ii) Legally, the residential property is owned by Shiny View Limited (SVL), a company incorporated in the British Virgin Islands on 27-4-2011 under the BVI Business Companies Act, 2004. Therefore, SVL is not an 'asset' of Respondent No.1.

(emphasis supplied by us)

(iii) The one and only issued share of SVL is held by and in the name of EFG Nominees Limited (of Jersey) which is the nominee of the Trustee for the Trust. (This is established by the Register of Members of SVL @ page 112 of CMA 5574). The Trustee is EFG Trust Company Limited which itself sits on the Board of Directors of the SVL as a Director along with its nominee EFG Nominees Limited. (This is established by the Register of Directors of SVL @ page 113 of CMA 5574/2017). Accordingly, the entire share capital of SVL is owned and controlled by or on behalf of the Trustee and the SVL (which is the registered proprietor of the Hyde House) is owned, managed and controlled by the Trustee as it occupies the Board of Directors and the issued share capital of SVL is held by the nominee of the Trustee. In the entire scheme of ownership and management of SVL as shown above the Respondent No. 1 is neither named nor has any other reportable ownership or nexus. The ownership and management of SVL vests in the Trustee and not Respondent No.1. ……

1(b) Consequence and Legal Submission

(i) Accordingly, applying the above to the Respondent No. 1, since he has no legal or defined beneficial interest in the asset in question (i.e. the residential property) nor the share of SVL (which is held by the nominee of the Trustee), there is no "asset" to be reported or disclosed in his nomination papers, tax returns or returns filed with the ECP. Hence, there has been no violation of Section

12(2) or 42A of the 1976 Act nor any other concealment under Article 62(1)(f) or otherwise is warranted against the Respondent No. 1.

(ii) On the contrary, even though strictly not required to, the "share in the trust" equivalent to the remittances sent to fund SVL/the Trust is being disclosed in Pakistan in the Wealth Statements of the four children of the Respondent No.1, the ultimate intended beneficiaries.

(iii) Moreover, the entire money trail of the monies which funded the Trust (which is the legitimate and disclosed income and wealth of the Respondent No.1) has been furnished in CMA 5574.

(iv) There is no issue or even pleaded allegation of 'assets beyond disclosed or known means' and the acquisition of the property is funded through monies remitted through official banking channels from Pakistan by the Respondent No. 1 as Settlor.

(v) Discretionary Trusts are well recognized in English law and the conceptually the same is also consistent with the (Pakistan) Trusts Act, 1882."

8. This is the sum total of the respondent's case in relation to the off-shore company *(SVL)*; that it is held by the trustee. Nowhere in the above written submissions has any reference been made to HSBC. Rather a clear impression has sought to be created that "EFG Trust Company Limited" is the trustee of **SVL** and the Hyde House despite the fact that the deed of settlement attached with CMA No.8187/2017 is between the respondent *(settlor)* and HSBC *(the original trustee)*. But from the documents referred to above as also the arguments made by the respondent's counsel it is absolutely unclear that amounts which were sent by the respondent through banking channels to his own account were ever transferred to the **SVL** or the trustees for the purchase of Hyde House. Nor was it clarified who opened and operated the account of SVL

and how the amounts sent to the account of SVL were utilized *(Note:- as mentioned above this was the exclusive burden of the respondent)* apart from a vague statement made by him stating that he assumes that the SVL account is with EFG Trust Company Limited, although he categorically added that he could not confirm such statement. However, it is the unequivocal case of the respondent that SVL and the said trust were created by him. No document was placed on the record to show that at the time of the creation and incorporation of SVL who were the shareholder(s) and Director(s) of the company. Again, it remains unproved that the purchase price of the Hyde House and construction costs thereof were borne by the respondent or SVL with the monies sent by him. Be that as it may, there is no dispute with respect to the fact that it was the respondent who selected and took the decision to purchase Hyde House; the respondent had the absolute and exclusive power and authority to take all decisions about the nature of construction; the approval of the design, besides the architect and the builder were of the respondent's choice. All the decisions and the actions regarding SVL and Hyde House in all respects were the absolute and exclusive privilege and prerogative of the respondent. It is emphatically argued on respondent's behalf that SVL is the legal owner of the Hyde House but when specifically asked who in this situation is the beneficial owner, the respondent's counsel was unable to convince us that even in these peculiar circumstances the beneficial ownership vests in SVL. However he then went on to argue that as SVL is held by the trust i.e. EFG Nominees Limited which is the nominee of EFG Trust Company Limited, therefore, the respondent has lost his beneficial ownership and interest, rather despite the fact that the respondent is the beneficiary of the trust along with his status as a settlor he cannot be held to be the beneficial owner of Hyde House. In this regard the contents of the respondent's written arguments are

reproduced "*Legally, the residential property is owned by Shiny View Limited (SVL), a company incorporated in the British Virgin Islands on 27-4-2011 under the BVI Business Companies Act, 2004. Therefore, SVL is not an 'asset' of Respondent No.1.*". It is also mentioned therein "*There is a residential property in England (Hyde House) which, in substance, is held under a trust arrangement through an "Irrevocable Discretionary Trust". (The deed of "Settlement" is at page2-38 of CMA 8187)*". It is thus clear that from the respondent's point of view that EFG Nominees Limited *(who are the nominees of EFG Trust Company Limited)* have exclusive shareholding of SVL and being the nominee of the latter, **SVL** and its property Hyde House, being a trust property for all intents and purposes, EFG Trust Company Limited is the ultimate trustee of the trust in which SVL and the Hyde House vests. The learned counsel for the respondent did not contend that EFG Nominees Limited or EFG Trust Company Limited had the power and the authority vested in the alleged shareholder and Directors of SVL to create a trust for SVL or its property; or that a trust of the SVL and of Hyde House had in fact has been created by the said company or the trustees or that this was legally permissible in the given facts and circumstances of the case. Instead he unequivocally avowed that the trust was created by the respondent and **he** is the exclusive settlor thereof. We have no reasons to discard this assertion; however the consequence of the above has to be taken into consideration. As mentioned above, if the respondent claims to be neither the legal nor the beneficial owner of SVL and its property, then by the same token, how come and under what authority, power and right, could the respondent be a settlor of that property and create a trust with regard to which he has no right or interest of any nature at all. In other words the question is, whether he could give **SVL** and its property to a trust, the answer is in the negative, because when the respondent as mentioned earlier according to the respondent's own case was not the owner of the

property either legally or beneficially, therefore he could not transfer as settlor the property to the trust and, therefore, no valid trust of Hyde House was created by him. And if EFG Trust Company Limited is removed from this scenario, then obviously the SVL as per the record of HM Land Registry of the UK is the legal owner of the property. And in such circumstances the respondent for all intents and purposes was/is the actual, real, true and beneficial owner. It may be pertinent to mention here that when specifically questioned by the Court, the respondent's counsel responded that the trustee is EFG, which is a private bank and a corporate entity which was nominated as trustee. But he never clarified exactly who nominated EFG. In his oral submissions at one point of time the respondent's counsel made particular reference to *"The Settlement"* and stated that trust arrangement was held under HSBC Bank which was then transferred to the EFG. But this is all verbal jugglery. No foundation for this stance was laid down in the pleadings. No document was filed though repeatedly so required by the Court. Interestingly at one point during his arguments the respondent's counsel asserted *"the trust bought a plot with a house"* which was demolished and a loan was obtained from EFG Private Bank Limited to fund the construction cost. He admitted that the mortgage payments were made by SVL but were funded by the respondent as he could send funds to SVL to pay off the said mortgage. Again no proof exists on the record of the following; of the mortgage, when it was made, with whom, what was the amount of the loan, when the loan amount was sent by the respondent for the redemption of mortgage, whether the mortgage was created before as is recorded in the land register and the amount was paid afterwards, because according to the record placed before us the last payment sent by the respondent was on 26.3.2014 whereas the charge over Hyde House was created on 23.7.2015. It may not be out of

place to mention here even at the cost of repetition that it is not denied that the respondent selected the Hyde House and took the decision to purchase the same. The physical possession of the Hyde House before and after its construction remains with the respondent. The usufruct also has been and remains with the respondent. It is not the respondent's case that refurbishing and furnishing of the house has been undertaken by the trust. It is not controverted that the Hyde House was never rented out by the respondent or even by the so-called trustee. It is being maintained and all the utility charges and other charges and the taxes etc. are being borne by the respondent. It is also mentioned in clause 19 of *"The Settlement"* that the fee of the trustees shall be paid by the respondent *(settlor)* which means that the alleged trustees are not working free of cost, but for consideration perhaps as agents or in a status akin thereto at the behest and on behalf of the respondent. Therefore without going into the question of whether the trust arrangement made through *"The Settlement"* is discretionary or otherwise in nature and even if we accept that it has been executed between the persons named in *"The Settlement" (it bears mention that this is not a registered document)*, yet the question still remains whether according to the settled principles of the trust law from the foreign jurisdiction and under Trust Act, 1882 of Pakistan *(on which the learned counsel for the respondent has placed reliance in his written arguments)* it is unequivocal that for the purposes of a valid trust, three conditions are essential and must co-exist and in the absence of any one condition, no valid trust would come into existence. These conditions are also known as **THREE CERTAINTIES OF THE TRUST** and are as follows (i) it is necessary that the settlor demonstrates that a trust was intended and its purpose; (ii) demarcates the property that is to be the subject of that trust and (iii) identifies who are the beneficiaries of the trust.

9. As regards the first condition, we do not intend to go into the question of whether the respondent intended to create a trust by virtue of *"The Settlement"* as it is argued by his counsel that the intention behind the creation of the trust was to keep the "trust property" *(Note:- whatever that property was)* intact and for the future enjoyment of his progeny after the demise of the respondent. In other words, a clog on the disposal of the property was put during the period of trust i.e. 150 years in this case. Suffice it to say that it is not a charitable or a religious trust or a trust meant for the benefit of a class such as orphans; disabled persons; the old, sick or infirm; meant for any hospital or medical purposes; poor workers; affectees of any calamity such as a flood or earthquake. For all intents and purposes *"The Settlement"* relied upon by the respondent is a private trust of which the respondent and his spouse are the "discretionary lifetime beneficiaries" and after respondent's lifetime *(i.e. settlor's)*, his spouse and progeny are the discretionary beneficiaries during the trust period. In such a situation it can always be considered by the court whether the intention is/was fictitious; although the express declaration of trust should be taken as conclusive. However, this rule gives way where the intention to create the trust is palpably false i.e. where a sham trust has been created. When it is regarded as a sham the trust must fail, and the property should revert to the settlor. This might occur, for example, where an individual attempts to siphon off and hide his money in an off-shore trust based in the Channel Islands while maintaining control and beneficial ownership of those funds[6], for instance in *Rahman v. Chase Bank Trust Co. Ltd.*[7] it was held that the settlor retained total control over the trust funds and, therefore, could never have genuinely intended to set up a trust. The court, in such

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[6] Michael Haley and Lara McMurtry, *"Equity and Trusts"* 2nd Edition 2009, Section 2.09 of Chapter 2 on page 37.
[7] [1991] J.L.R. 103 (a Jersey case)

circumstances, will look at the reality and substance of the purported transaction and a trust that at face value appears perfectly valid may be set aside if it is a sham trust or an illusory trust, i.e. if the settlor in essence retained the full beneficial interest and did not pass any interest in the property to the proclaimed trustee, the "trust" is a mere fiction and a pretence. In this case, as this point was not agitated by the petitioner and we were unable to get adequate assistance, we would not express our opinion any further.

10. The second essential of the trust is the subject *(subject matter)* of the trust which in the present case could either be **SVL** which is the legal title holder of the Hyde House as claimed by the respondent's counsel or the property itself *(i.e. Hyde House)*. Learned counsel for the respondent in his written submissions has stated that the one and the only issued share of SVL is held by, and in the name of EFG Nominees Limited *(of Jersey)* which is the nominee of the "trustee of the trust". This, according to the learned counsel is established from the Register of Members of SVL *(at page 112 of CMA No.5574/2017)*. The trustee is EFG Trust Company Ltd. which itself sits on the Board of Directors of SVL as Director along with its nominee EFG Nominees Limited. This he urged is fortified by the Register of Directors of SVL *(at page 113 of CMA No.5574/2017)*. Accordingly, the entire share capital of SVL is owned and controlled by or on behalf of the trustee and SVL which is the registered proprietor of Hyde House, which is in turn owned, managed and controlled by the trustee of SVL i.e. held by the nominees of the trustee. It is pertinent to mention here that the word "**trustee**" appearing in the written arguments has not been elaborated, rather from the syntax of these submissions the trustee is "EFG Trust Company Limited" and its nominee is "EFG Nominees Limited". It may be mentioned that in his oral submissions in this regard and also in the written arguments the respondent's counsel,

he made reference to *"The Settlement"* dated 5.5.2011. Therefore it is necessary to ascertain as to who is the **trustee** in this case and whether SVL or the Hyde House has been entrusted to that trust or trustee and by whom and when and through which mechanism this was done. *"The settlement"* for this purpose as mentioned above has been relied upon by the respondent. It is named "THE RANDOM TRUST". Respondent is the settlor and HSBC GUYERZELLER TRUST COMPANY of West Bay Road, Grand Cayman, Cayman Islands is the trustee. The most important aspect in this regard is that the trust property or the trust fund is **Pound Sterling 100**. This is clearly mentioned in *"The Settlement"* that *"(A) The Settlor covenants on the execution of this deed to pay the trustee the sum of Pound Sterling 100 to be held by the trustees upon the following trusts and with and subject to the following terms and conditions ……. (B) It is contemplated that further property may be transferred to be placed under the control of the trustees by way of additions to the trust funds"*.

11. We have gone through *"The Settlement"* and failed to find when or how under this document SVL or "Hyde House" were ever transferred to HSBC GUYERZELLER TRUST COMPANY *(Note:- the respondent was not the shareholder of the SVL so he could not be a settlor for such share which he does/did not own in order to create a trust:- He as a beneficial owner has not transferred the Hyde House to any trust. It is not the case of the respondent that the shareholder of SVL i.e. or the Director of the trust or for that matter the EFG Trust Private Limited has given the trust to itself)*. The respondent has also not provided/shown to us, as repeatedly mentioned above, in his written statements *(in the manner of pleadings)* if "Hyde House" was subsequently transferred or entrusted to the trustee named in *"The Settlement"* by any other document or mechanism. No date of transfer or the entrustment and particulars to prove the same have been brought on the record in this behalf or even mentioned by the respondent's counsel. It is the case of the respondent that in fact EFG Trust Company Limited

is the trustee of the SVL, the proprietor of the Hyde House ***(emphasis supplied)***. It is not pleaded, shown, established or proved on the record that EFG Trust Company Limited was ever appointed by the respondent as the trustee under *"The Settlement"* or any other trust deed. In fact, it is not the stance of the respondent that EFG Trust Company Limited legally or factually took over the HSBC, the original trustee, under some deed, contract or legal arrangement and the EFG Trust Company Limited or EFG Private Bank Limited by operation of law became the trustee of **SVL** and thus the Hyde House. It is not even the case of the respondent that HSBC as its nominee or agent under clause 12 of *"The Settlement"* or clauses 19 or 20 or 21 of the document has conferred any power or authority on "EFG Private Bank Limited", "EFG Trust Company Limited" or "EFG Nominees Limited". Despite our repeated queries and probe no satisfactory answer was forthcoming from the respondent's side in this behalf. Therefore we are of the firm opinion that neither the SVL nor Hyde House were a trust property under *"The Settlement"* or any other document so far on the record. Moreover from the money trail provided to us, it is the case of the respondent that the entire amount for the purchase and construction of Hyde House was sent by the respondent in a legal way through proper banking channels. If that were so, and even if SVL was created as a special vehicle for the purposes of holding a property for the respondent, it *(SVL)* was for the purposes of legal title and was at most a legal owner of the property as urged by the respondent's counsel for the purposes of avoiding present or future tax liability/implication. However, once the veil of incorporation of **SVL** is lifted, the respondent's face is clearly seen behind it as the true and actual owner of Hyde House. Perhaps **SVL** was created as a repository to hide his tax paid money, sent through banking channels and shown to have been spent on the creation of SVL and the purchase/construction

of the "Hyde House"; but this was done in a clandestine and dubious manner. The object behind this exercise was to hide and stash the said money, SVL and the property from the tax authorities and from the public eyes; by a person who has even in the past been a holder of a public office and presently occupies such an office. It may be pertinent to mention here that the respondent has not placed and proof on the record that the amounts he transferred to his personal bank account abroad were utilized for the purchase etc. of "Hyde House" and those were ever transferred to SVL for this purpose. In our view, SVL or Hyde House were never transferred, passed on and made a part of the trust property, by, under or pursuant to *"The Settlement"* and for all intents and purposes, regardless of the fact that the legal title of the property vested in SVL per the record i.e. HM Land Registry record. The respondent was, has been and remains to be the true, real and beneficial owner of the property enjoying full control and discharging all the obligations of the owner. As regards the third essential of a valid trust, the beneficiaries of the trust are mentioned in *"The Settlement"* so therefore we would not like to comment further about it. Except we shall discuss and consider the stance of the respondent taken in the concise statement that he has no beneficial interest in the trust and the consequences thereof in the succeeding part of this opinion. There is another interesting aspect of the matter which is that though it is the case of the respondent that he had sent all the money which was utilized for the purchase and for the construction of Hyde House, but he has never declared the said amounts in his own tax returns, rather he has shown these *(amounts)* as gifts to his four children, without there being any gift actually made to them, because no cross-cheques of the gifted amounts were brought on the record envisaging the gift of the said amount in favour of the children. Moreover, when such gifts were never made, how could the children in

their tax returns show such amount as their share in the trust *(some unknown trust?)* without mentioning the Hyde House or SVL as an off-shore company or mentioning EFG Nominees Limited or EFG Trust Company Limited? Because in their tax returns the children have in fact shown such amounts to be their share in some *(unknown)* trust. This all seems rather farcical.

12. Above all the most important and crucial aspect of the matter is: that in his concise statement it is the clear and unequivocal stance of the respondent *"the Answering Respondent himself has no beneficial interest therein and is simply a settlor of the trust in question"*. But this assertion made in the concise statement has been belied by *"The Settlement"* relied upon by the respondent where he and his spouse are shown to be the "discretionary lifetime beneficiaries". Schedule III of *"The Settlement"* clearly mentions so, whereas spouse, his children and progeny shall only be "discretionary beneficiaries" after the demise of the respondent as per Schedule IV. Both the Schedules are reproduced as below:-

SCHEDULE III

(Discretionary Lifetime Beneficiaries)

*For the purposes of clause 6, the "**Discretionary Lifetime Beneficiaries**" means the following persons or class of persons living or in existence at any time before the end of the Trust period:*

Name	***Date of birth***	***Relationship to Settlor***
The Settlor	*04/07/1953*	
The Settlor's wife	*10/09/1956*	

SCHEDULE IV

(Trusts after the Settlor's lifetime)

1. (a) *In this Schedule IV, the "**Discretionary Beneficiaries**" means, subject to the following provisions of this paragraph, the following persons or class of persons living or in existence at any time before the end of the Trust Period:*

Name	***Date of birth***	***Relationship to Settlor***
The Settlor's wife *The Settlor's children*	*10/09/1956*	
The Settlor's grandchildren and remoter issue.		

This is a blatant and shocking untrue statement on behalf of the respondent, which is not expected from an **honest** person. Perhaps the respondent at the time when the concise statement was filed never expected that such a deep probe would be conducted into the matter by this Court and thought to get away with the camouflage and variety of covers, layers and veils of his off-shore company. But at the end he was unable to avoid the truth. Thus on account of what has been said above, we hold that the respondent for all intents and purposes was the actual, real, true and beneficial owner of "Hyde House" and he was required under the law to declare such property and the asset in his nomination papers filed on 9.9.2015, to contest the by-elections. And on account of this concealment that respondent is held not be an "honest" person within the contemplation of Article 62(1)(f) of the Constitution and Section 99(1)(f) of ROPA, therefore he has incurred the disqualification to be the member of the Parliament and ceases to be the member thereof. Besides on account of his unequivocal stance in the concise statement that he has no beneficial interest in the trust or the property is also an untrue statement made by him before the highest judicial forum of the country as *"The Settlement"* relied upon by the respondent belie his stance. On this account also he not being "honest" stands disqualified under the provisions of the Constitution and the law mentioned above.

AGRICULTURAL INCOME (Proposition No.3):

(That Respondent No. 1 in relation to his income has committed following misrepresentations;

a) For the year 2010 and 2011 disclosed yearly incomes in his tax returns different from the statements before Election Commission of Pakistan;

b) Inflated his agriculture income for whitening his undisclosed income;

c) evaded agriculture income tax.

Thus making him not qualified to contest the election of, or being a Member of Parliament by virtue of the provisions of Article 62(1)(f) of the Constitution of Islamic Republic of Pakistan.)

13. In the context of this proposition the petitioner has set out a case based on the following four pillars:

(A) That the respondent willfully misstated less agricultural income in his nomination papers dated 27.3.2013 filed with the ECP as against the agricultural income declared in his income tax returns with the FBR. These are vital and unexplained discrepancies, to highlight those, the petitioner has placed a chart in his petition which is reproduced as under:-

Tax Year	***Agri income as declared before ECP***	***Agri income as declared before FBR***	***Discrepancy***
2010	*120,000,000*	*545,000,000*	*425,000,000*
2011	*160,000,000*	*700,282,263*	*540,282,263*

(B) The respondent has overstated his agricultural income with the FBR with the intent to launder *(whiten)* his undeclared income from unknown sources and to justify income earned through black money. It is averred in the petition that the income tax charged on agricultural income is less than that charged on other sources. *(Note: This seems to be a misconception on the part of the petitioner because agricultural income of the tax payer is altogether exempted under Section 41 of the Ordinance, 2001)*. It is alleged that the respondent by over-stating his income from agricultural sources attempted to unlawfully evade income tax payable under the Ordinance, 2001 in case he had disclosed the real source of such income.

(C) As per the agricultural income declared at the entry at Sr. No.14 of the nomination papers submitted before the Election Commission of Pakistan for the General Election 2013, the respondent has failed to pay the agricultural income tax amount due for the years

2010-11 as required under Section 3 read with the 2nd Schedule of the Punjab Agricultural Income Tax Act, 1997 *(the Act of 1997).* The leviable agricultural income tax is Rs.22500 + 15% of the income exceeding Rs.300,000/-, hence the respondent is guilty of evasion of more than Rs.31,00,852/- for these two years. The details of the agricultural income of the respondent for the said years and the tax evaded by him have been set out in the chart given in the petition as under:-

Tax Year	***Agricultural Income Tax before ECP***		***Agricultural Income Tax due under Punjab Agricultural Income Tax Act, 1997***	***Unpaid Tax (in Rupees)***
	Agri Income (as declared) before ECP	*Agri Income Tax Paid (as declared) before ECP*	*Leviable Income Tax Rs.22500+15% of income exceeding Rs.300,000/-*	
2010	*120,000,000*	*3,171,024*	*17,977,500*	*14,806,976*
2011	*160,000,000*	*7,781,124*	*23,977,500*	*16,196,376*
Total				***31,002,852***

(D) The total agricultural income of the respondent as declared by him with the FBR for the tax year 2010 was Rs.545,000,000/- and for the tax year 2011 it was Rs.700,282,263/-. The tax leviable on the said amounts under Section 3 read with Schedule of the Act of 1997 amounts to Rs.81,705,000/- and Rs.104,997,393/- respectively, which the respondent knowingly, willfully evaded causing a great loss to the national exchequer; at least to the tune of Rs.175,750,245/-. In this regard the petitioner has relied upon the following chart in the petition:-

Tax Year	***Agricultural Income before FBR as declared***	***Agricultural Income Tax due***	***Unpaid Tax***
2010	*Rs.545,000,000/-*	*Rs.81,705,000/-*	*Rs.78,533,976/-*
2011	*Rs.700,282,263/-*	*Rs.104,997,393/-*	*Rs.97,216,269/-*
Total			***Rs.175,750,245/-***

14. On the contrary, the respondent's learned counsel has argued that the respondent was not elected on the basis of the

nomination papers dated 27.3.2013, thus the discrepancies and the alleged misdeclaration or misstatement etc. therein cannot be made the basis for rejecting his nomination papers filed on 9.9.2015 in the by-election, which he has won. And such material cannot be used to attribute any dishonesty to the respondent. Besides, the respondent had two sources of agriculture income (i) from his self-owned holding (ii) from his leasehold holding of 18566 acres; for the purposes of the tax paid under the Act of 1997 the respondent has correctly declared the income which he derived from his personal holding and accordingly paid the agriculture income tax thereupon, calculated as per the law. The same has never been questioned by competent authorities under the Act of 1997. Under the law he was not obliged to pay agricultural income tax on agricultural income derived from his lease holding. Whereas in the income tax returns filed under the Ordinance, 2001 the agricultural income derived by the respondent from the entire land cultivated *(both owned and leasehold)* has been mentioned. And this entire agricultural income was exempt under Section 41 of the Ordinance, 2001. It is stated that there was no concealment of the latter income *(i.e. from the leasehold land)* because along with the nomination papers dated 27.3.2013, the respondent has attached his income tax returns for the relevant years 2010-2011 which reveal the same amount of agricultural income which the respondent declared before the FBR; further, no misstatement and/or misdeclaration at the time of scrutiny of his nomination papers filed on 27.3.2013 was attributed to the respondent, which were duly accepted. Same is the position regarding the nomination papers filed to contest the by-election in 2015, where no objection was raised by anyone on the above account. It is also submitted that the respondent had won this election which was not challenged by anyone having *locus standi* to do so under ROPA, on the noted or any other ground. It is urged that

entry at Sr. No.14 of the nomination papers in fact and law requires the information regarding agricultural income paid by the candidate for a particular year(s) and for this purpose only column No.4 of the said entry was relevant and the former two columns were only ancillary and incidental thereto and in any case shall not govern or control the clear language of the main entry at Sr. No.14, which leaves no room for doubt that through the same, specific and particular information is being sought regarding the agricultural income tax **paid** by the candidate for the last three years. It is further argued that no action for any alleged misdeclaration or short payment of the agricultural income tax has been taken against the respondent by the concerned department under the provisions of the Act of 1997. And as per Section 4(4) of the Act of 1997 the limitation to do so has lapsed. Therefore, the alleged misdeclaration and the short payment cannot be made a ground for a petition under Article 184(3) and imputed as dishonesty to the respondent in terms of Article 62(1)(f) of the Constitution. *[Any tax law if found not to have been strictly followed by a tax payer or any inaccuracy in the required declaration or any omission to make a declaration of something required shall not necessarily mean, that the omission etc. and consequently less or improper payment of tax is a dishonest act on the part of the tax payer to attract the disqualification clause under the Constitution and the law,* ***until and unless*** *it has been so held and declared by the forum of competent jurisdiction under that particular law. It is the case of the respondent that in his nomination paper(s) he has correctly declared the amount of the Punjab agricultural tax, which he has paid in the years 2010-11 on the agricultural land which was held by him (his owned holdings) whereas, besides, the above holdings, the respondent was also cultivating about 18566 acres of land on lease and for the income derived from the lease holding land he was not obliged to pay the agricultural income tax. And this has never been questioned by the concerned authorities under the Act of 1997. And the total income derived by the respondent from his owned holding and from the lease holding was accordingly declared*

to the FBR and this was exempted under the Income Tax Ordinance, 2001 (see Section 41)]. It is lastly submitted that the same grounds which have been raised in the petition are the subject matter of the two show cause notices, both dated 27.5.2016 issued by the income tax department for the year 2010-2011 and the matter is sub-judice either in the departmental hierarchy or the High Court and/or before this Court, therefore any view expressed or findings given in this behalf in these proceedings are bound to cause serious prejudice to the respondent which is not permissible under the law. The details of such pending matters and the orders passed therein have been placed on the record *(see CMA No.4142/2017)*.

15. Heard. Much emphasis has been laid by both the learned counsel for the parties regarding the interpretation of Section 3 of the Act of 1997 with specific reference to sub-section (3) of the same which is the charging provision. In this context, reliance has also been placed on the agricultural income defined in Section 2(a) of the Act *ibid*. Furthermore, according to the petitioner's counsel there is no distinction between the self-owned holding or the leasehold holding of a **person** and in this regard he has placed reliance upon the following dictionary meanings of the term "holding":-

> *Handbook of Legal Terms & Phrases, Judicially Defined*
> *"Holding signifies the nature of the right enjoyed by the tenant or occupier of the land. It means land held by an occupier under some agreement."*
>
> *Black's Law Dictionary, Eighth Edition*
> *"Holding: Legally owned property, esp. land or securities."*
>
> *Excellent Legal Dictionary: Words and Phrases*
> *"Holding: General term for property, securities, etc. owned by person or corporation."*
>
> *Concise Oxford English Dictionary*
> *"Holding: An area of land held by lease. Financial assets."*
>
> *21st Century Dictionary*
> *"Holding: Land held by lease. An amount of land, shares, etc. owned by a person or company."*

On account of the above it is argued that the respondent was obliged to pay the agricultural income tax on whole of his agricultural income as has been defined by the definition clause *[Section 2(a)]*. Suffice it to say that in the present proceedings which are under the provisions of Article 184(3) of the Constitution and admittedly in the nature of a quo-warranto petition, we are not expected and required to adjudge the honesty or dishonesty of a member of the Parliament on the basis of our determination and adjudication whether he has not declared *(truthfully)*; misdeclared; or short declared his agricultural income and thus failed to discharge his tax liability in the past as has been prescribed by a particular tax/fiscal law. This cannot and should not be merely done on the basis of our own interpretation of the law for the first time and on the basis of our own findings and conclusions to hold that there is a misdeclaration or non-declaration etc. and consequently short payment of the tax; to thereby declare a Parliamentarian "dishonest", within the purview of Article 62(1)(f) *ibid*. The mechanism for charging, declaration of the amounts/assets subject to the charge of tax etc., the process of assessment and the resulting/subsequent adjudication; the liability for the failure to comply with such law and the consequences of recoveries, fines, penalties have been provided by the law, which are to be undertaken by specified forums in a particular form and by adhering to a particular procedure. The law provides a person aggrieved of such actions/decisions with a complete hierarchy of further remedies before higher forums. We have seen that in the instant matter the declaration of agricultural income by the respondent and the tax paid thereupon has not been questioned by the concerned department. We are also not inclined to make such a declaration on the basis of the nomination papers of the respondent in the year 2013 which were never challenged

by anyone on that score and he was also not elected in that election. Besides, from the nomination papers it is clear that the respondent did attach his income tax/wealth tax returns and the agricultural income which was different from the nomination papers was clearly mentioned therein. Moreover, from the perusal of the record, which is not controverted by the petitioner, it stands revealed that two proceedings against the respondent have been initiated by the income tax department on the basis of the variation and the difference in the agricultural income as declared by him in his nomination papers of 2013 for the concerned years *(2010-2011)* and the agricultural income *(declared)* under the Ordinance, 2001. Regarding the income tax return of the respondent for the year 2010 *(filed on 7.10.2010)*, Assistant Commissioner, Inland Revenue, issued a notice *(No. Audit-01/2010/1068)* dated 27.5.2016 to him under Section 122(9) read with Section 122(5) of the Ordinance, 2001 with respect to certain discrepancies *inter alia* in the said return submitted by him and the agricultural income given in the statement of assets and liabilities submitted with his nomination papers *(dated 27.3.2013)* with the ECP. The relevant portion of the notice is reproduced as below:-

> *"2. DIFFERENCE OF AGRICULTURAL INCOME*
>
> *In the Election Commission of Pakistan (hereinafter referred as 'ECP') you filed a statement of Assets, Liabilities & Income which does not reconcile with those declared in his Tax Declaration in FBR. Cross-matching of Declarations in ECP & FBR for Agriculture Income is as follow:*

Tax Year	***ECP***		***FBR***	***Discrepancy***
	Agriculture Income (as declared)	*Agri Income Tax Paid (as declared)*	*Agriculture Income (as declared)*	*(FBR-ECP)*
2010	*120,000,000*	*3,171,024*	*545,000,000*	*425,000,000*

> *Above matrix shows that in ECP you declared (under oath) your Agriculture Income of Rs. 120,000,000 for the Tax Year 2010 with the claim of Agriculture Income Tax (Provincial) Rs.3,171,024 paid under Punjab Agriculture Income Tax Act 1997. This declaration (in ECP) renders particulars of Income of the taxpayer, declared with FBR for the respective tax year, inaccurate warranting action under section 111(1) of the Income Tax Ordinance, 2001."*

This notice was replied to by the respondent on 23.6.2016 through his authorized representative A.F. Ferguson & Co. *(authorized representative)* in which it was stated:-

> *"10. It has been confronted that agricultural income of Rs. 545 million declared by taxpayer in FRTI for subject tax year is not in agreement with the amount of Rs. 120 million disclosed as agricultural income in 'nomination form' submitted by the taxpayer with ECP and in such background, taxpayer has been required to explain its position, failing which intentions have been shown to add the differential amount of Rs. 425 million towards taxable income under section 111(1) of the Ordinance.*
>
> *11. In this connection, it would be appropriate that 'nature' of agricultural income derived by the taxpayer during the year is explained first. During the tax year under consideration, taxpayer derived agricultural income from agricultural land 'owned' as well as held by it under 'lease arrangements' and derived income therefrom in the following manner:*
>
> *(i) Agricultural income derived from 'owned land'- Rs.120 million; and*
> *(ii) Agricultural income derived from 'leasehold land' – Rs.425 million.*
>
> *12. In the above background, we now invite your attention towards the fact that the nomination form required to be furnished with the ECP required the provision of details of 'landholding', 'agricultural income' derived and 'tax' paid by the taxpayer on 'owned' lands, a fact readily verifiable from the*

> *relevant form prescribed by ECP. Accordingly, the particulars relating to 'owned lands' were disclosed in Entry No.14 of subject nomination form. Moreover, under the relevant provincial legislation i.e. Punjab Agricultural Income Tax Act, 1997, agriculture Income Tax was only payable in respect of 'owned lands' and thus disclosure in ECP's nomination form was clearly warranted only to the extent of 'owned lands'. Nevertheless, in the income tax return and wealth statement, aggregate agricultural income of Rs.545 million was disclosed by the taxpayer. It may be appreciated that copies of relevant income tax return/wealth statements were also filed with ECP that duly evidences the taxpayer's bona fide that there was no attempt, intentional or otherwise, to report lesser amount of agricultural income to ECP."*

Pursuant to the above an Amended Assessment Order dated 30.6.2016 under Section 122(1)/122(5) of the Ordinance, 2001 by the Deputy Commissioner, holding therein that *"Regarding the matter of difference in agricultural income declared in income tax return and that declared before Election Commission of Pakistan, the explanation of the taxpayer carries weight. In support, the taxpayer filed complete details of agricultural income and bifurcation of income earned from owned land and income from leasehold land comprising of 18566 Acres under the title of JK Farms. The taxpayer was requested to provide area wise detail of land acquired on lease which has also been filed and placed on record. Since, the prescribed format of declaration to be filed before the Election Commission of Pakistan does not include any column for declaring income earned from leasehold land therefore the same was not mentioned therein. Further, the taxpayer has declared correct particulars of income before Income Tax Department; therefore, there is no need to add the difference again to income already declared by the taxpayer. Regarding the matter of tax on agricultural income, the agricultural income enjoys exemption from income tax by virtue of Section 41 of the Income Tax Ordinance, 2001. Since, taxation of agricultural income is subject of Provincial Government; therefor, no action can be taken in this regard by this office being the issue out of jurisdiction. In view of the above, no adverse inference in*

this regard is warranted". Following this, the Additional Commissioner, Inland Revenue issued a Show Cause Notice dated 10.8.2016 to the Respondent under Section 122(9) read with Section 122(5A)/122(4) of the Ordinance, 2001 wherein he stated that the acceptance of explanations rendered with regard to discrepancies in agriculture income by the Deputy Commissioner, was an erroneous assessment *inter alia* on the basis that 26 lease agreements have proven to be fake on account of not being verifiable, and hence invoking the provisions of Section 125(5A) read with Section 122(4) of the Ordinance, 2001 he is amending the assessment order made by the Deputy Commissioner *(ibid)*. The Respondent's authorized representative responded to this Show Cause Notice by submitting preliminary objections to the same *vide* letter dated 26.08.2016; however the preliminary objections made by the authorized representative were rejected by the Additional Commissioner, Inland Revenue on 30.08.2016. A Writ Petition No. 27535/2016 was then filed by the Respondent against the said proceedings regarding his income tax returns for the year 2010 which was allowed by the learned High Court vide its judgment dated 30.12.2016 *(see pages 123 to 133 of CMA No.3675/2017)*. The income tax department filed Review Petition No.19/2017 which was dismissed on 17.4.2017 *(see pages 5 to 9 of CMA No.4142/2017)*. The department, however, has filed Civil Petition No.349-L/2017 against the said order which is pending adjudication before this Court. For the income tax return of the respondent of the year 2011 *(filed on 17.11.2011)*, Assistant Commissioner, Inland Revenue, issued a notice *(No. Audit-01/2010/1069)* dated 27.5.2016 under Section 122(9) read with Section 122(5) of the Ordinance, 2001 to the respondent wherein similar discrepancies in the income tax returns of 2011 and agricultural income stated in the statement of assets and liabilities filed with his nomination papers warranting action under Section 111(1) of the Ordinance, 2001 were

brought to his attention. The respondent through his authorized representative sought some adjournment to file a reply; which *(reply)* was not filed and therefore the Deputy Commissioner Inland Revenue vide order dated 8.8.2016 issued a notice of demand to the respondent in respect of tax year of 2011, whereby after appraising him of the manner of the proceedings being carried on in the absence of the respondent's reply or participation despite reminders and opportunities, it was decided that the respondent had evaded tax amount due by trying to disguise his taxable income as agricultural income. The respondent appealed against the said assessment order on 8.8.2016 which was decided by the Commissioner Inland Revenue (Appeals) on 2.9.2016 whereby the assessment order of 8.8.2016 was confirmed. The respondent brought an appeal before the Appellate Tribunal, Inland Revenue *(ATIR)*, against this decision of the Commissioner Inland Revenue *(ibid)* which allowed the appeal on 24.10.2016. Against said decision of the Appellate Tribunal Inland Revenue an income tax reference bearing No. 349/2016 was filed by the revenue department before the Lahore High Court as per Section 133 of the Ordinance, 2001. This income tax reference was allowed by judgment dated 16.10.2017, and the most recent update concerning these proceedings is that the matter has been remanded to the ATIR on account of it being the final forum for undertaking factual inquiry, and in the meanwhile an injunctive order has been obtained with respect to the recovery of tax from the respondent. The Tribunal, on remand, has extended the earlier stay order granted to the respondent on 7.10.2016, when his previous appeal was pending before deciding in favour of the respondent. The operative part of the said order dated 23.10.2017 reads as *"The stay granted is extended for a further period of 30 days or till the decision of the appeal whichever is earlier"*. Such proceedings as are pending shall involve not only factual but also the legal issues, such as *inter alia* the

interpretation and application of the provisions of Section 3 of the Act of 1997; the question with regards to the jurisdiction of the income tax authorities under the Ordinance, 2001 and more importantly the factual aspect as to whether the respondent has obtained on lease the land measuring 18566 acres and thus has derived agricultural income from such land, which shall be exempt from the income tax under Section 41 of the Ordinance, 2001. Thus any view expressed by this Court in the proceedings in the nature of quo-warranto *(which is a discretionary remedy and relief)* is likely to cause prejudice to the respondent, and even the FBR; because the FBR in its concise statement in the instant matter has taken a stance against the respondent. As there exist disputed facts we shall not express any view in this regard nor make any interpretation of the provisions *(Section 3)* of Act of 1997 to determine the honesty or otherwise of the respondent for the purposes of Article 62(1)(f) of the Constitution. It may be reiterated that the authorities under the Act of 1997 have not so far initiated any action against the respondent for the alleged misdeclaration or the short payment of the "agricultural income tax" under the special law. And we are not sure if such action in the light of the provisions of Section 4(4) of the Act of 1997 can now be taken by the said department. We are also refraining from exercising our discretion in favour of the petitioner and against the respondent because of the clear mandate of Article 4 of the Constitution which enshrines *"To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen"*. In the present situation when no action has thus far been taken against the respondent under the law i.e. Act of 1997 and the action taken against him by virtue of Ordinance, 2001, the other possibly applicable law is as yet pending before various fora and has not reached its conclusion: therefore in such circumstances to adjudge the honesty or

otherwise of the respondent would be against the mandate of Article 4 *ibid*.

16. It may also be mentioned here that despite the above legal position in order to satisfy ourselves if *prima facie* respondent has obtained 18566 acres of land on lease, we required the respondent to place on record the ***khasra girdawaris*** and the ***jamabandis*** for the relevant period. This has not been done and the explanation given by the counsel in this behalf is that as per the prevalent practice in the area the lessors are reluctant to show the possession of the lessee in the revenue record. But the respondent has placed on the record a number of **unregistered** lease agreements, in an attempt to establish the factum of leases; as also the payments of the lease amounts to the lessor which according to the respondent have been made through crossed cheques and according to the bank certificate required by us, and filed vide CMA No.8187/2017, the amounts have been transmitted to the accounts of the lessors or the head of the family or the person authorized on their behalf. It may further be added that the respondent has also placed on the record the documents, regarding the payment of *abiana* of such leased land or a part thereof and also the sale proceeds of the agricultural produce attained by the respondent from the land, along with certain documents pertaining to the expenses incurred by him for the crops sown *(CMA No.7013/2017)*. As against the above no material in rebuttal has been placed on the record by the petitioner to establish that such lease agreements are fake or forged or the payment to lessors or the expenses incurred by the respondent in this regard are incorrect. In these circumstances the above controversy being factual in nature and despite our authority to hold inquisitorial proceeding which we have applied to the maximum, we do not find this to be a fit case for further

probe, when the matters as stated earlier are pending adjudication before different fora and this is one of the disputed issues.

17. As regards the scope and interpretation of entry No.14 of the nomination papers which reads as follows:-

> *"14. The agricultural income tax paid by me during the last three years is given below:*
>
> | ***Tax Year*** | ***Land holding Acres*** | ***Agricultural income*** | ***Total agricultural Income Tax paid*** |
> |---|---|---|---|
> | *2012* | *295* | *165,000,000* | *8,654,929* |
> | *2011* | *507.5* | *160,000,000* | *7,181,124* |
> | *2010* | *507.5* | *120,000,000* | *3,171,024* |
>
> *Note II: Attach copies of agricultural tax returns of the last three years mentioned above."*

On the plain reading of the entry which is the main provision, the primary question asked and the purpose behind it seems to be requiring the candidate to disclose the "**agricultural income tax**" he has paid during the last three years. The predominant requirement is about the amount of the "tax paid" and the relevant column in this context is 4 i.e. *"Total agricultural income tax paid"* whereas columns No.2 and 3 of the table are the enabling part of the 4th column when considered in the light of the language of the entry. Note II reproduced above then requires the attachment of the copies of the agricultural tax return. One is not required to specify, independent of the return, about the holding of the land. It is not the case of the petitioner that false and fake figure of the "tax paid" was mentioned in column No.4 or that the copies of the returns were either not filed or were bogus etc. Therefore, on the above account too we are not persuaded to declare the respondent "dishonest" within the purview of Article 62(1)(f) of the Constitution.

WRITTEN OFF LOAN (Proposition No.4):

(That Respondent No. 1 was Director of the Company which remained under the management of his family members and a loan amounting to Rs. 49 Million was written off by the banks thus making him disqualified to contest the election of, or from being, a member of Parliament by virtue of the provisions of Representation of People Act 1976 read with Article 63(1)(n) of the Constitution of Islamic Republic of Pakistan.)

18. It is the case of the petitioner that the respondent was a Director of the company *[presumably Faruki Pulp Mills Ltd. (FPML)]* which remained under the management and control of his family members and loans amounting to Rs.49.81 million were written off by the banks and therefore he was disqualified in terms of Article 63(1)(n) of the Constitution to contest and hold the membership of the National Assembly. It may be relevant to mention here that no details have been provided by the petitioner in the petition as to the period when the respondent was the Director of the said company; what was his shareholding; who were the family members of the respondent managing the affairs of the company; what was the period when such loans were written off. Be that as it may, in this regard, a letter of the State Bank of Pakistan dated 28.3.2013 has been relied upon, according to which, in response to the request by the ECP *(SBP Portal)* for the scrutiny of the nomination papers of Mr. Jehangir Khan Tareen who was contesting election from constituency NA-154 Lodhran in 2013, the information provided was as under:-

> *"Please refer to your request received through ECP (SBP Portal) for scrutiny of nomination papers of captioned candidate, the detail of overdue/write off amounting to Rs. 2 million and above for last one year reported by the member financial institutions against the candidate/spouse/dependent as on February 28, 2013 is given below:-*
>
CNIC/Name	***Relation with Candidate***	***FI Name***	***Overdue***	***Writeoff***
>
> ---------- *No Record Found* ----------
>
> *Further, candidate/spouse/dependent is also director/owner of following companies having overdue/write off amounting to Rs. 2 million and above for last one year:-*

(Rs. In Million)

CNIC/Name	***Relation with***	***Name of Company***	***FI Name***	***Overdue***	***Writeoff***
35202-2698829-5/JHANGIR KHAN TAREEN	*SELF*	*FARUKI PULP MILLS LTD.*	*UNITED BANK LTD.*	*0*	*19.234*
35202-2698829-5/JHANGIR KHAN TAREEN	*SELF*	*FARUKI PULP MILLS LTD.*	*MCB BANK LTD.*	*0*	*9.015*
35202-2698829-5/JHANGIR KHAN TAREEN	*SELF*	*FARUQUI PULP MILLS LTD.*	*ROYAL BANK OF SCOTLAND*	*0*	*21.57*
35202-2698829-5/JAHANGIR KHAN TAREEN	*SELF*	*STATE ENGG. A/C. HEAVY MECHANICAL COMPLEX*	*INDUSTRIAL DEVLEOPMENT BANK LIMITED (FORMERLY IDBP)*	*.932*	*0*
35202-2698829-5/JAHANGIR KHAN TAREEN	*SELF*	*STATE ENGG. A/C. HEAVY MECHANICAL COMPLEX*	*NATIONAL BANK OF PAKISTAN*	*406.818*	*0*
35202-5803969-1/ALI KHAN TAREEN	*SON*	*FARUKI PULP MILLS LTD.*	*UNITED BANK LTD.*	*0*	*19.234*
35202-5803969-1/ALI KHAN TAREEN	*SON*	*FARUKI PULP MILLS LTD.*	*MCB BANK LTD.*	*0*	*9.015*
35202-5803969-1/ALI KHAN TAREEN	*SON*	*FARUKI PULP MILLS LTD.*	*ROYAL BANK OF SCOTLAND*	*0*	*21.57*

From the above document alone the necessary details to attract the disqualification of Article 63(1)(n) to the respondent are not established. It is also not proved that FPML was under the managing control of the respondent or his family members when the loans *(though the period is not specified)* were written off. Presumably it was in the year 2007. Whether the respondent or his spouse or dependents were the shareholders *(or indeed the extent of such holding)* or directors of the company does not transpire from this letter. However, in the letter dated 4.4.2013 placed by the respondent on the record addressed by the MCB Bank Ltd. to the Chief Election Commissioner and the Returning Officer of NA-154, it is stated *"We would like to clarify that the loan write-off of Rs.9.015 million on account of Faruki Pulp Mills Limited, as reflected in the above letter of State Bank of Pakistan pertains to a loan that was availed by Faruki Pulp Mills Limited prior to Mr. Jahangir Khan becoming a Director of Faruki Pulp Mills Limited. We would further clarify that the settlement of loan, including write-off of Rs.9.015 million, also took place prior to his becoming Director of Faruki Pulp Mills Limited. As per our records, Mr. Jahangir Khan Tareen*

became a Director of Faruki Pulp Mills Limited on 29-12-2010 and resigned as Director on 4-02-2013". The other letter dated 5.4.2013 has been issued by United Bank Ltd. to the Chief Election Commissioner which states *"We would like to clarify that the loan write-off of Rs.19.234 million on account of Faruki Pulp Mills Limited, as reflected in the above letter of State Bank of Pakistan, pertains to a loan that was availed by Faruki Pulp Mills Limited prior to Mr. Jahangir Khan Tareen becoming a Director of Faruki Pulp Mills Limited. We would further clarify that the settlement of loan, including write-off of Rs.19.234 million, also took place prior to his becoming Director of Faruki Pulp Mills Limited"*. There is another letter of the State Bank of Pakistan dated 1.4.2013 in which it has been clarified that M/s Heavy Mechanical Complex is a government owned entrepreneur and Jahangir Khan Tareen was the *ex-officio* nominee Director of that company. We have been apprised by the learned counsel for the respondent, and the same was not controverted by the petitioner's side, that the respondent only held 500 qualifying shares in FPML which he acquired in the year 2010 and became a Director of the company. With his resignation as a Director of the company on 4.2.2013, these shares were also disposed of. It is not the case of the petitioner before us that on account of the name of respondent's son, Ali Khan Tareen, appearing in the noted letter of the SBP, the respondent in the context of written off loan is disqualified. No submissions in relation to Ali Tareen were made before us. Therefore, we are clear in our mind that the aforesaid written off loan does not pertain to the respondent or any of his companies or his spouse and dependents in which he had the requisite shareholding for the purposes of attracting disqualification envisaged under Article 63(1)(n) of the Constitution. Confronted with the aforesaid material, learned counsel for the petitioner also did not rebut the same in his rebuttal arguments and to our clear understanding, he virtually gave up this ground.

19. In view of our reasons expressed above in this opinion upon the propositions involved in the matter, we have reached to the following **conclusion**:-

a) The preliminary objection of the respondent that the present petition being primarily in the nature of quo-warranto is not maintainable in law, has no force. As we on the basis of the material on the record are not persuaded to hold that the petition is a counterblast to a similar kind of a petition filed by Mr. Imran Khan Niazi against Mian Mohammad Nawaz Sharif or this is a proxy petition filed for the benefit of someone else, and it is tainted with *mala fide* and has been filed with ulterior motives. We hold so especially when the maintainability of the petition has not been questioned on the ground that this Court lacks jurisdiction under Article 184(3) of the Constitution or that the respondent is not a holder of a public office.

b) For the proposition that the respondent being the Director of JDW Sugar Mills Ltd., knowing fully well that the said company has decided to take-over the majority shares of USML, on the basis of such classified, insider and sensitive information purchased the shares of USML in a clandestine manner in the name of his Driver and Cook, namely, Haji Khan and Allah Yar and thus, violated the provisions of Section 15-A of the Ordinance, 1969, the Ordinance, 1984 and other laws on the subject. And also committed the offence of insider trading in terms of Section 15-B of the Ordinance *(ibid)*. In this respect, investigation against the respondent was conducted by the SECP and in reply to the show cause notice/letter of the SECP dated 3.12.2007, the respondent through his response dated 8.12.2007 admitted to the commission of insider trading and, therefore, paid the gained amount of Rs.70.811 million along with fines and penalties and charges to the SECP as were finally demanded. The question, therefore, is whether this

reply of the respondent dated 8.12.2007 and his act of paying of the amount as claimed by the SECP constitutes an admission on his part and hence is disqualified in terms of Article 62(1)(f) of the Constitution. We conclude that the letter of the respondent dated 8.12.2007 is a qualified offer to the SECP and also subject to the "without prejudice" rule, therefore, it cannot be treated an admission admissible under Article 36 of the Order, 1984 on the basis of which the respondent can be adjudged to be dishonest in these quo-warranto proceedings, particularly in the situation when the SECP accepted the offer of the respondent and categorically held "*Upon receipt by the Commission of the bank draft the above-referred matters shall stand disposed off with no further action*". Moreover the respondent was not criminally prosecuted by the SECP under the provisions of Section 15-B of the Ordinance, 1969 and thus, for all intents and purposes this is a past and closed transaction. We are also not persuaded to hold that the provisions of Section 15-A and 15-B of the Ordinance, 1969 in the facts and circumstances of the case and because of subsequent enactment of the Act, 2015 are *ultra vires* of the Constitution.

c) The proposition that the respondent should be declared dishonest on account of some alleged misdeclaration and short payment of the agricultural income tax for the years 2010 and 2011 because there are vital discrepancies in the declaration of agricultural income in the tax returns filed with the FBR for these two years. We are not persuaded to make any declaration against the respondent in this context because the matter whether inaccurate declaration has been made by the respondent, either in respect of agricultural income tax before the concerned department under the Act of 1997 or before the FBR, is a matter which is sub-judice before different forums in the income tax hierarchy and even before this Court; besides, no action so far for the

alleged misdeclaration or short payment has been taken against the respondent by the authorities under the Act of 1997.

d) We are not convinced and persuaded on the proposition that the respondent has got any loans written-off from various banks and thus, has incurred disqualification under Article 63(1)(n) of the Constitution because such loans have been written-off with regard to FPML and was prior to the year 2010, whereas the respondent at that time was not the shareholder or Director of the said company. He became the shareholder and Director with effect from 29.12.2010 to 4.2.2013 and during this period no loans were written-off; besides the respondent was *ex-officio* Director of the Heavy Mechanical Complex being the Federal Minister and resultantly any written-off loans with respect to this company cannot be attributed to the respondent.

e) We hold that SVL, an off-shore company was established by the respondent which has legal title of the property measuring 12 acres known as "Hyde House" but the actual, true, real and beneficial owner of the said property is the respondent. Respondent has sent around more than fifty crores of rupees at the exchange rate prevalent at that time and claims that amount to have been utilized for the purposes of purchase and construction of "Hyde House". SVL or Hyde House was never transferred to any trust by the respondent, thus, it is his **asset** which he has failed to declare in his nomination papers filed on 9.9.2015 according to the mandate of the law to contest the by-elections from NA-154 Lodhran and, therefore, he is not honest in terms of Article 62(1)(f) of the Constitution read with Section 99(1)(f) of ROPA. Besides, in his concise statement the respondent in unequivocal, clear and unambiguous terms stated that he has no beneficial interest in the trust arrangement which holds the SVL and the Hyde House, however

> from the trust deed dated 5.5.2011, on which reliance has been placed by the respondent himself, he is the 'discretionary lifetime beneficiary' along with his spouse and, therefore, this is a blatant misstatement on the part of the respondent made before the highest judicial forum of the country which is not a trait of an honest person. Consequently, on both the counts mentioned above, the respondent is declared not to be an **honest** person in terms of the constitutional provisions and the provisions of ROPA, therefore, he ceases to be the member of the Parliament having incurred the disqualification.

Therefore, on account of the above, we hold and declare that in view of our findings on the proposition about the off-shore company *(in short)* covered by clause (e) of the conclusion, the respondent is disqualified in terms of Article 62(1)(f) of the Constitution read with Section 99(1)(f) of ROPA for the non-declaration of his property/asset i.e. "Hyde House" in his nomination papers, and in making untrue statement before this Court, that he has no beneficial interest in SVL, therefore, he should cease to hold the office as the member of the National Assembly with immediate effect. This petition is accordingly allowed.

CHIEF JUSTICE

JUDGE

JUDGE

Announced in open Court on **15.12.2017** at **Islamabad**
Approved for reporting

CHIEF JUSTICE